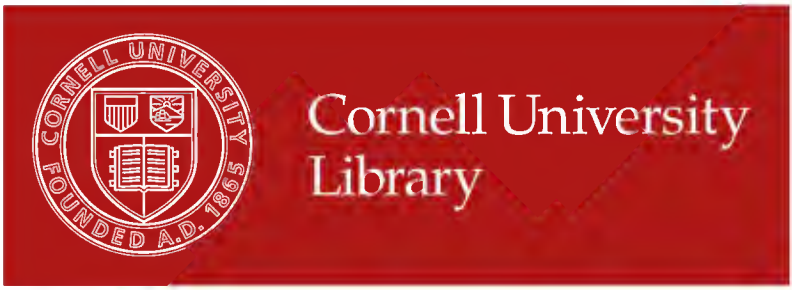

PRINCIPLES

OF THE

LAW OF CONTRACTS

BY

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To

My Father and Mother

PREFACE

In this book the author has undertaken first, to codify the law of Contracts by reducing it to propositions or rules of law—and, second, to make these rules of workable value to the student, teacher and practitioner, by means of an analysis thereof, an explanation of the reasons therefor, a statement of the exceptions thereto, and an illustration of the applications arising therefrom.

Throughout the book, he thinks, credit has been given to whom credit is due. For the most part, the illustrations used are the cases which have been selected by Professor Williston, and various other men, for use in American law schools, and a table of cases gives ready reference to them.

The principles of Quasi Contracts are so interwoven with those of Contracts proper that any work on Contracts must treat of them, but in this book, so far as possible, they have been given independent treatment in a separate chapter.

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TABLE OF CONTENTS

Page

Preface v

Analysis ix

Chapter

I. Legal Rights 1

II. Quasi Contracts 8

III. Agreement 40

IV. Reality of Agreement 59

V. Parties 80

VI. Consideration 104

VII. Legality of Object 121

VIII. Formalities 143

IX. Classification 165

X. Interpretation 178

XI. Breach and Remedies 186

XII. Discharge 200

Table of Cases 227

Index 237

ANALYSIS

I. Legal rights in rem, § 2
   A. Arising without contract, § 2
   B. Arising from contract, § 2
II. Legal rights in personam, § § 3-234
   A. Arising quasi ex contractu, § § 4, 8-45
      (I) Obligations equitable, § § 8-37
      (II) Obligations statutory, § 39
      (III) Obligations customary, § § 40-44
      (IV) Obligations of record, § 45
   B. Arising ex contractu, § § 5-7, 46-234
      (I) Ancient essentials, § § 46-49
         (A) In debt, § 47
         (B) In covenant, § 48
         (C) In assumpsit, § 49
      (II) Modern essentials, § § 50-175
         (A) Agreement, § § 50-68
            1 Offer, § 51-60
            2 Acceptance, § § 61-68
         (B) Terms definite and certain, § 69
         (C) Intention to create legal relations, § 70
         (D) Reality of assent, § § 71-99
            1 Mistake, § § 72-77
            2 Misrepresentation, § § 78-81
            3 Fraud, § § 82-90
            4 Duress, § § 91-94
            5 Undue influence, § § 95-99
         (E) Parties, § § 100-134
            1 Certainty, § 101
            2 Competency, § § 102-120
               a. Sovereign states, § 102
               b. Corporations, § 103
               c. Infants, § § 104-111
               d. Persons non compos mentis, § § 112-117
               e. Married women, § 118
               f. Aliens, § 119
               g. Others, § 120
            3 Privity, § § 120-130

a. Agency, § § 122-126
b. Assignment, § § 127-130
4 Number, § § 131-134
a. Joint, § 132
b. Several, § 133
c. Joint and several, § 134
(F) Consideration, § § 135-137
1 Unilateral agreements, § 136
a. Legal right given by one, § 136
b. Promise by another to give legal right, § 136
2 Bilateral agreements, § 137
a. Promise of legal right by one, § 137
b. Promise of legal right by other, § § 137, 229
(C) Legality of object, § § 138-154
1 Prohibited by law, § § 138-145
a. Crimes, § 139
b. Torts, § 140
c. Professions and business unlicensed, § 141
d. Work and labor on Sunday, § 142
e. Wagers, § 143
f. Lotteries, § 144
g. Usury, § 145
2 Contrary to the policy of the law, § § 138, 146-154
a. Dealings affecting the state, § § 146-147
(1) External relations, § 146
(2) Internal relations, § § 147-148
b. Dealings affecting society as a whole, § § 149-154
(1) Morals, § § 149-150
(2) Commerce, § § 151-153
(3) Public health and safety, § 154
(H) Formalities, § § 155-175
1 Formal agreements, § § 155-174
a. Requirement of seal, § § 156-159
b. Requirement of writing, § § 160-174
(1) Commercial paper, § 161
(2) Statute of frauds, § § 162-173
(3) Miscellaneous, § 174
2 Formless agreements, § 175
(III) Classification, § § 176-190
(A) As to form, § § 176-178
(B) As to performance, § 179

(C) As to validity, § 180
(D) As to subject-matter, § § 181-190
1 Principal, § § 182-189
a. Affecting property rights, § § 183-187
b. Affecting personal rights, § § 188-189
2 Accessory, § 190
(IV) Interpretation, § § 191-204
(A) Rules of evidence, § § 191-194
(B) Rules of construction, § § 195-204
(V) Breach, § § 205-208
(A) Repudiation, prevention, or failure to perform, § § 205-208
1 Before performance is due, § § 205-208
2 After part performance, § § 205-208
3 By promisor, § § 205-208
4 By promisee, § § 205-208
5 Independent promises, § 208
a. Absolute, § 208
b. Divisible, § 208
c. Subsidiary, § 208
6 Dependent promises, § 208
a. Promissory conditions precedent, § 208
b. Promissory conditions concurrent, § 208
(VI) Remedies, § § 209-216
(A) Ancient, § 209
(B) Modern, § § 210-216
1 Extra judicial, § 210
2 Judicial, § § 211-216
a. Reformation, § 211
b. Rescission, § 212
c. Injunction, § 213
d. Specific performance, § 214
e. Damages, § § 215-216
(VII) Discharge, § § 217-234
(A) Of antecedent rights of contracts, § § 217-226
1 By operation of original contract, § 218
2 By performance, § § 219-221
3 By new contract, § § 222-223
4 By cancellation and surrender, § 224
5 By alteration, § 225
6 By breach, § 226
(B) Of remedial rights for breaches of contracts § § 227-234
1 By act of parties, § § 228-230
a. Release, § 228

b. Accord and satisfaction, § 229
c. Arbitration and award, § 230
2 By act of law, § § 231-234
a. Judgment, § 231
b. Bankruptcy, § 232
c. Stautute of limitations, § 233
d. Change in law, § 234

LAW OF CONTRACTS

CHAPTER I.

LEGAL RIGHTS.

I. Legal rights in rem, § 2
   A. Arising without contract, § 2
   B. Arising from contract, § 2

II. Legal rights in personam, § § 3-7
   A. Arising quasi ex contractu, § 4
   B. Arising ex contractu, § § 5-7
      Agreement, § 6
      Obligation, § 7

§ 1. A legal right is the conduct which one person is entitled, by state political authority, to require from another, or others.

Human law embraces the rules of conduct obtaining among classes of human beings and enforced by human displeasure, but positive law includes only those rules of human conduct enforced by state political authority. The first rights of man were those rules of conduct which were enforced by might. Later the power of public opinion enforced certain rights. But rights could be called legal only when the power of the state was obtained to enforce them. The right of a person to another's conduct is an antecedent right; his right to the power of the state to enforce it, a remedial right. The first arises prior and independently of any violation thereof; the second at the time of the violation of the antecedent right. The antecedent right is a legal

right when accompanied and re-enforced by a remedial right. So far as the law defines antecedent rights and provides remedial rights for their enforcement, it is called substantive law; so far as it specifies the ways in which it will enforce remedial rights, adjective law, or procedure. The subject-matter, that is, the subject or matter presented for consideration by positive law, then, is legal rights; and, as contracts is a branch of positive law, it follows that the subject-matter of contracts is legal rights. Therefore, a study of the law of contracts should start with this fundamental conception.[1]

§ 2. Legal rights may require forbearance by all the world, in which case they are known as legal rights in rem. Rights in rem are created either by executed contracts or without any contract. As to the persons bound to refrain, they are legal duties.

Rights in rem are such as require others to forbear from doing some act. They exist in the abstract. They are negative in character and are antecedent to any wrong. Of such rights are life, liberty, family and property. Historically, these are the most primitive rights of men. They may be either public or private. Public rights are those which the state asserts to itself, and violations thereof are crimes, punishable by actions in the name of the state. Private rights are those which by contract or without contract reside in natural or artificial persons in their private capacity. Violations of private rights in rem result in torts which are redressed by civil actions ex delicto; for, though these rights may be created by executed contracts, as an executed contract is one all of whose terms have been completely performed, as soon as the contract is executed, it has spent its force and is no longer enforcible at law as a contract.[2]

[1] Pollock on Contracts, 1; 2 Kent's Com. 1; Holland on Jurisprudence, 56; Clark, Austin's Jurisprudence, 134; Holland on Jurisprudence, 34.

[2] Holland on Jurisprudence, 173; Anson, Law and Custom of the Constitution, 2.

ILLUSTRATIONS.

(1) A finds a roll of bank bills, which has been lost, and A does not know and has no means of finding out to whom it belongs. B takes the roll of bills away from A, and appropriates it to his own use. A may sue B in conversion (tort action) and recover the value of the roll, as A has acquired, by occupancy, a right of possession in the goods against all the world, except the true owner.[3]

(2) In the above illustration, the state may also indict B (but not A) for larceny (criminal action) and punish him by fine or imprisonment, as it has a right against all its citizens not to have any of them commit the crime.[4]

(3) A gives B a horse and B takes it into his possession. Later A takes the horse away from B. B can sue A in conversion, as by the gift B has acquired a complete property right to use, possess and dispose of the horse, which is good against all the world, including A.[5]

(4) If A should sell a horse to B, and the price should be paid and the animal delivered, the same right of property would be created by executed contract, and for any interference with that right a tort action would lie.[6]

§ 3. Legal rights may require an act, or acts, to be done by some particular person, or persons, in which case they are known as legal rights in personam. Rights in personam are created either by implication of law or by executory contracts. Legal rights in personam are legal obligations as to the person bound to act.

Rights in personam are positive, they require others, not to forbear, as is required by the rights redressed by tort actions, but to do some act. They exist in the concrete. Whether the rights arise by implication of law or by executory contracts, all violations of them are redressed by contract actions. They are legal obligations because the law binds or obliges the person against whom the right exists to do the act for the one in whose favor the right exists.[7]

[3] Armory v. Delamirie, 1 Strange, 505.

[4] Baker v. State, 29 Ohio St. 184.

[5] Kellogg v. Adams, 51 Wis. 138, 8 N. W. 115.

[6] Hatch v. Standard Oil Co., 100 U. S. 124.

[7] Holland on Jurisprudence, 162, 173.

§ 4. A quasi contract is a legal obligation, created by pure implication of law, and enforced by an action ex contractu.

In a legal obligation created by implication of law, the law or natural equity alone produces the obligation by rendering obligatory the facts from which it results, and it is for this reason that these facts are called quasi contracts because, without being contracts, they produce obligations of the same sort as actual contracts. The legal rights created are rights to have done what the law requires without agreement, but they are such as would have arisen had the parties made a valid agreement. They are rights in personam, but in many ways they resemble rights in rem. They lie in the territory between torts and contracts. They are constructive contracts. The contract is a mere fiction, a form imposed in order to adapt a case to a given remedy. But they are enforced by actions ex contractu. Rights created by contract are the result of agreement and obligation. Rights created by quasi contract are the result of obligation without agreement. In the one, the intention is ascertained and enforced; in the other, it is disregarded. The latter are implied solely by law because equity and good conscience or positive rules of law demand it. They are called implied contracts; not because they are actual contracts, that is, not because there is an actual meeting of the minds of the parties or a mutual understanding to be inferred by a jury from language, acts and circumstances, for there is no actual meeting of the minds or mutual understanding, but they are called implied contracts because of a legal fiction invented and used for the sake of the remedy. They are not contracts but legal obligations created without contracts.

These obligations are created by law when any person has received benefits which in equity and good conscience belong to another, when positive duties are laid on one person for the benefit of another by statute or common law, or when a judgment has been rendered against a wrongdoer by a court of competent jurisdiction.[8]

[8] Keener on Quasi Contracts, 15; 10 Harvard Law Review, 217; Sceva v. True, 53 N. H. 627; Street, Foundations of Legal Liability,

§ 5. An executory contract is a legal obligation, created by agreement, and enforced by an action ex contractu.

It is an agreement which creates legal rights in personam. This is the usual sense in which the term "contract" is used, and that in which it will, hereafter, be employed in this book, executed contracts not being included. It may also be correctly and concisely defined as an agreement enforcible at law, or as an obligatory agreement. The legal right created is to have done what the law requires because of the agreement. For a failure to have done what one is entitled thus to require, there arises a remedial right to an action for damages, or, in case of a contract to convey land or to sell a chattel of peculiar and nonmarketable value, a suit for specific performance. The essential elements of the definition are agreement and obligation.[9]

§ 6. An agreement is the meeting of at least two minds in one and the same intention, by means either of a promise for a promise or of a promise for an act.

Another way in which this idea may be stated is that there must be assent at the same time, to the same thing, in the same sense. This is accomplished by some sort of offer and acceptance. In the case of mutual promises, the contract is called bilateral; in the case of a promise for an act, unilateral. [10]

§ 7. The obligation of a contract is found in the fact that the law binds the parties to the performance of their agreement.

In order to create an agreement to the performance of which the law will bind the parties, that is, in order to create a legal obligation, the agreement;

208, 235; Jones v. Pope, 1 Wms. Saund. 37; Woods v. Ayres, 39 Mich. 345. But see Gordon v. Bruner, 49 Mo. 570; First Nat. Bank of Nashua v. Van Vooris, 6 S. D. 548, 62 N. W. 378; Head v. Porter, 70 Fed. 498.

[9] Holland on Jurisprudence, 173, 174; Pollock on Contracts, 3.

[10] Pollock on Contracts, 3, 7; Anson on Contracts, 3.

first, must be definite and certain; second, must contemplate a legal obligation; third, must be free from mistake, misrepresentation, fraud, duress and undue influence; fourth, must be made by competent parties; fifth, must rest upon a sufficient consideration; sixth, must have a lawful object; and seventh, must be in the form required by the law of evidence.

A valid contract is an agreement, definite and certain in terms, contemplating a legal obligation, free from mistake, fraud, duress and undue influence, made by competent parties in the form required by law, based on a sufficient consideration and with a lawful object. A voidable contract is an agreement which one of the parties at his option may treat as though it had never been binding. A void agreement is one that from the beginning has no legal effect.

In its contractual sense, a legal obligation is the constraining power or authoritative character given to an agreement by virtue of the fact that it is enforcible at law. Thus it is seen that a contract is a species of agreement, but that there are many agreements which are not contracts. Any agreements which are not enforcible at law, which are not obligatory, which do not create legal rights, are outside of the pale of contracts. They may create moral rights and obligations, but they will have to be taken inside the pale before they can create legal rights and obligations.

In order to be enforcible at law there must be a perfect agreement, that is, the offer and acceptance by which the agreement is consummated must meet in one and the same intention, which must be definite and certain, relate to legal relations and be procured without duress, undue influence or fraud. But, as the law will not permit one to take advantage of his own wrong, when an agreement has been secured by duress or undue influence or fraud, it is enforcible against the person practicing the same and to that extent the agreement is obligatory. In order to be enforcible at law, the agreement must be made by competent parties. Generally, all human begins are in law considered competent to enter into valid agreements, but there are a few whom

the law disqualifies in whole or in part; and artificial beings or corporations, being but the creatures of the law, possess only such powers in this regard as are given to them by the law. Agreements made by persons lacking capacity cannot be enforced against them and in that aspect are not contracts; but, if the other party to the agreement is competent, he is bound, and to that extent the agreement, like agreements procured by duress, etc., is obligatory. Sometimes the law will not recognize a promise unless it is in a particular form, as, for example, unless it conforms to the requirements of the statute of frauds, and not being in that form it is not enforcible at law. In order to be enforcible at law, the subject-matter of the agreement must be such as the law recognizes and allows. Any and every agreement must have what is known as a sufficient consideration. This means that in a bilateral contract each party, and in a unilateral, the party doing the act, must have a legal right to hold the other to a promise. There are many acts and promises which the law will not recognize, and which therefore can never be sufficient consideration to support a contract. The thing to be done must possess, or be reducible to, a pecuniary value, or be a thing of which the law will compel specific performance. Again the promise must be to do something which the law will allow. If it is forbidden by statute, or constitutes an indictable offense, or is a tort, or is contrary to public policy, in other words, is illegal by statute or common law, the authority of the courts cannot be obtained to enforce it and it remains an agreement without legal obligation. If an agreement complies with all of these requirements, legal obligation attaches to it at once. It creates legal rights. It becomes enforcible at law. It is a contract."

[11] Holland on Jurisprudence, 162;
Pollock on Contracts, 8.

CHAPTER II.

QUASI CONTRACTS.

I. Obligations equitable, § § 8-37
   A. Benefit conferred, § 9
   B. Conferrer entitled to benefit in equity and good conscience because conferred, § § 10-26
      1. By request, or acceptance, without agreement, § 10
      2. By fraud or appropriation, § 11
      3. By misrepresentation by one standing in confidential relation, § 12
      4. By compulsion, § § 13-15
         a. Undue influence, § 13
         b. Duress, § § 14-15
            (1) Of imprisonment, § 14
            (2) Per minas, § 15
      5. By reliance, § § 16-26
         a. On contract unenforcible because, § § 16-24
            (1) Modified by consent, § 16
            (2) Substantial compliance, § 17
            (3) Condition express or implied, § 18
            (4) Default of other party, § 19
            (5) Act of God, etc., § 20
            (6) Lack of authority, § 21
            (7) Incapacity of party, § 22
            (8) Statute of frauds, § 23
            (9) Mistake as to subject, etc., § 24
         b. On other legal relations, § § 25-26
            (1) Ownership of chattels or land, § 25
            (2) Duty, § 26
   C. Conferrer not entitled to benefit because, § § 27-37
      1. Benefit conferred by voluntary act, § 27
      2 Illegal conduct of party conferring benefit, § 28
      3 Change of position of party receiving benefit, § 29
      4. Bona fide third parties, § 30
      5. Only net benefit recoverable, § 31
      6. Effect of valid express contract, § 32
      7. Waiver of tort, § 33
      8. Family relationship, § 34
      9. Infant's, etc., liability, § § 35-37
II. Obligations statutory, § 39
III. Obligations customary, § § 40-44
   A. Promise for benefit of third party, § 40
   B. Contribution and general average, § 41

C. Public service companies, § 42
D. Care and diligence, § 43
E. Warranties, § 44
C. Public service companies, § 42

§ 8. Whenever a benefit has been received by one person which in equity and good conscience (ex aequo et bono) belongs to another person, the law implies an obligation on the part of the former to refund the same and permits the latter to recover its value in an action ex contractu.

This is the most general principle of quasi contracts and covers a multitude of cases. Otherwise stated, "No one should be allowed to enrich himself unjustly at the expense of another." It is an equitable principle growing out of the abhorence of equity at seeing one man take another man's property without compensating him for it. In order to render it applicable it must appear: first, that a benefit has been conferred by one upon another; and second, that in equity and good conscience this benefit belongs not to the one receiving it but to the one conferring it. The mere fact that one person confers a benefit upon another is not enough, alone, to create any legal obligation. Every man is, ordinarily, permitted to regulate his own affairs in his own way, and he is protected from officious intermeddlers.

ILLUSTRATIONS.

(1) A loans money to B on C's becoming a surety, both B and C signing a bond as security. By A's neglect this bond becomes of no use. Can A recover from C for money had to A's use? No. C has received no benefit, and A alone is in fault. In order to recover in this action one must show to the court that the other party receives a benefit and that he has equity and good conscience on his side.[12]

(2) A being indebted to B makes an assignment for B's benefit of all A's property on the X farm. The debt not being paid he allows B to take possession and sell not only this property but also the stock, crops, etc., on the Y farm, thinking they are covered by the assignment. Can he or his assignee recover the effects sold from the Y farm? No.

[12] Straton v. Rastall, 2 Term R. 366.

B is entitled to keep this property though A did not intend to let him have it, and, therefore, A cannot recover it in a suit in quasi contract.[13]

(3) A, by mistake in drawing up and signing a note to B, leaves out the interest but by another mistake in paying the note, pays interest on the same. Can he recover the interest thus paid in an action for money had and received? No. Ex aequo et bono the money belongs to B.[14]

(4) A orally agrees to buy land from B and pays $65.00. He then decides not to go on with the agreement although B is ready to do so. Can A recover the money paid? No. It does not in equity and good conscience belong to him, so long as the other party does not take advantage of the statute of frauds.[15]

§ 9. **The benefit received may be labor or services, money or goods (anything which has a pecuniary value), but, in order to amount to a benefit, positive enrichment is required; a mere saving to one party or a loss to another will not suffice.**

This limitation is for the purpose of preventing inequity, which would be likely to result if the rules were extended. Herein also lies a distinction between quasi contracts and torts; only such torts can be waived and suits in quasi contract instituted as result in a benefit to the estate of a person, which is capable of being measured pecuniarily. Property rights, whether corporeal or incorporeal, are included, but where no such benefits are received, but there is merely a naked wrong, the liability is only in tort for the wrong. If the benefit is in labor and services, the suit is assumpsit for labor and services; if money, assumpsit for money had and received; if goods, assumpsit for goods sold and delivered. Where goods converted have been sold by the wrongdoer, the count for money had and received is proper.

ILLUSTRATIONS.

(1) A infringes B's patent rights and B sues in equity for an injunction and account of profits. Pending the suit, A dies. Does the suit

[13] Platt v. Bromage, 24 Law J. Exch. 63.

[14] Buel v. Boughton, 2 Denio (N. Y.) 91.

[15] Collier v. Coates, 17 Barb. (N. Y.) 471.

survive? Yes, as this is a benefit which is capable of being measured pecuniarily.[16]

(2) A removes B's wheat stack, while a fire is raging, in order to save the stack from burning, but without any request from B. Can A recover for work and labor? No. He is an officious intermeddler and there is no positive enrichment.[17]

(3) A places timber on the bank of a stream from which place it is accidently loosened and carried by the tide. B finds it and voluntarily carries it to a place of safety. Is B entitled to anything for services? No, as no benefit has been conferred. At least he has no lien.[18]

(4) A orally agrees to make a monument and to pay $200 cash for a lot of B. He makes the monument and has it in his possession when B repudiates the agreement. Can A recover the value of his services? No. The agreement is within the statute of frauds as it is an agreement to sell the lot and not a contract for labor and material. Therefore, if he can recover at all it will have to be in quasi contract; but to recover in quasi contract there must be a benefit conferred which is not the case here, as A has the monument in his possession.[19]

§ 10. A benefit belongs, in equity and good conscience, to another, if conferred because of a request though without any agreement as to remuneration, or if, though there is no request, the party benefited is free to elect whether he will or will not accept, and elects to accept,

ILLUSTRATIONS.

(1) A requests B, an attorney, to render certain legal services for him, there being no express or inferred agreement as to remuneration. Is B entitled to recover for the value of his services? Yes, since there is a request for the services, the law implies an obligation to pay therefor. Under such circumstances, it is generally possible to infer a true contract.[20]

(2) A sends goods to B's house without any request from B, and B accepts and uses the goods. Is he liable in quasi contract to pay what the goods are worth? Yes. Most cases of this sort arise in connection with mistake.[21]

[16] Head v. Porter, 70 Fed. 498.

[17] Bartholomew v. Jackson, 20 Johns. (N. Y.) 28.

[18] Nicholson v. Chapman, 2 H. Bl. 254.

[19] Dowling v. McKenney, 124 Mass. 478.

[20] Rose v. Spies, 44 Mo. 20.

[21] Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495.

(3) A undertakes to carry goods for B and deliver them to C. By mistake, A delivers them to D who appropriates and sells them. C pays B and A pays C. Can A recover from D on a count for money had and received? Yes, as this is not a case of one officiously paying money for another.[22]

(4) A ships a horse over the X railroad to station Y. After its arrival, A calls for the horse but for trumpery reasons leaves without taking the horse. The X railroad then hires the animal cared for at a livery, and later has to pay this livery bill, when the X railroad sends the horse to A, who keeps it. Can the railroad collect the amount paid for the livery? Yes. Humanity demands the care of the horse, and A's conduct justifies the railroad in providing it. Therefore, the law raises an obligation on the part of A to reimburse the X railroad.[23]

(5) A pays the necessary funeral expenses of a deceased person. Is he entitled to recover for the same in quasi contract? Yes. It is the duty of the executor to provide for a decent burial and the law implies an obligation to recompense one who, in the absence or neglect of the executor, not officiously, but from the necessity of the case, incurs reasonable expense. In the case of necessaries a request is implied by law.[24]

§ 11. A benefit belongs, in equity and good conscience, to another if conferred because of a tortious act of the party benefited.

ILLUSTRATIONS.

(1) A is a slave of B up to 1865, and from that time is kept by B in absolute ignorance of her emancipation, and works for him as his slave to 1889. After the death of her master, she learns she has been a free woman. Can she recover the value of her services? Yes, because they were obtained by fraud Whether she expected reward is, therefore, immaterial.[25]

(2) A who is already married represents to B that he is a single man, and solicits her to marry him. She, relying on his representation, does marry him, and for many years lives with him supposing herself to be his wife. Later she learns of the fact that A has another wife. Can she recover the reasonable value of her services? Yes, because of the fraud while performing the services, although she in fact expects no compensation.[26]

[22] Brown v. Hodgson, 4 Taunt. 189.

[23] Dawson v. Linton, 5 Barn. & Ald. 521.

[24] Patterson v. Patterson, 59 N. Y. 574.

[25] Hickam v. Hickam, 46 Mo. App. 496.

[26] Asher v. Wallis, 11 Mod. 146; Higgins v. Breen, 9 Mo. 497.

(3) A's machinery is tortiously taken, and after various sales is finally bought by B. The statute of limitations of three years has run against the tort, so that title by adverse possession may possibly have been acquired. Can A sue in quasi contract and recover the value of the machinery? Yes, because of the option to waive damages for the tort.[27]

(4) A entices B's apprentice away from B's shop. B sues in indebitatus assumpsit. Will this form of action lie? Yes. He may waive damages for the tort and recover the equivalent for the labor.[28]

§ 12. A benefit belongs, in equity and good conscience, to another, if conferred because of misrepresentation in regard to a material fact [by one standing in confidential relations], reasonably relied and acted upon to his damage by the other.

ILLUSTRATIONS.

(1) A is the guardian of B and pursuades B to sell him certain premises for $600 by representing to her that there is an indebtedness against the premises of $700 which he promises to assume. As a matter of fact the indebtedness amounts to only forty dollars. Is B entitled to recover the money paid the guardian? Yes.[29]

§ 13. A benefit belongs, in equity and good conscience, to another, if conferred because of compulsion, exerted by means of a judicial or official position, or a relation of confidence (undue influence).

ILLUSTRATIONS.

(1) A common carrier agrees to carry boots and shoes for a certain amount of freight, but at the terminus of the route refuses to deliver them unless paid about $1,000 more freight than it agrees to carry for. The shipper pays this amount and gets the goods. Can he recover freight paid? Yes. It is not a voluntary payment.[30]

(2) A who sustains a fiduciary relation to B, procures from her a conveyance of land without informing her of the true condition of the

[27] Kirkman v. Philips' Heirs, 54 Tenn. (7 Heisk.) 222.

[28] Lightly v. Clouston, 1 Taunt. 112.

[29] Wickiser v. Cook, 85 Ill. 68.

[30] Tutt v. Ide, 3 Blatchf. 249, Fed. Cas. No. 14, 275 b.

property. Coal is being mined on the land and the land is becoming valuable, but he withholds this information. Is B entitled to an accounting? Yes.[31]

(3) A pays the amount of an execution on a judgment which is subsequently reversed. Will indebitatus assumpsit lie? Yes. The money belongs to the person from whom collected and there is no other reasonable way to regain it.[32]

§ 14. A benefit belongs, in equity and good conscience, to another if conferred because of compulsion, exerted by imprisonment with or without legal process (duress of imprisonment).

ILLUSTRATIONS.

(1) J is incarcerated on a decree recovered against him, and is forced to give a new bond to one F, as assignee, to free himself from prison, there being no court where he can secure any remedy. Is he liable on the bond or can he get it overruled? He is not liable on this bond because of the duress of imprisonment.[33]

(2) A is arrested on a charge of burning B's house and barn, the evidence showing he simply burned some refuse parts of the building; but the justice orders him to recognize in the amount of $500, and by reason of B's representations that A will have to go to state's prison, A is unable to get sureties, and thereupon B offers to drop the matter for $125. A then turns over to B goods of the value of $60. Can their value be recovered? Yes, if the jury finds duress, that is, that A is arrested without cause, or for improper purposes, or without lawful authority.[34]

§ 15. A benefit belongs, in equity and good conscience, to another if conferred because of compulsion, exerted by threats inducing fear of injury to person or property (duress per minas.)

ILLUSTRATIONS.

(1) A is a dealer in ice, and, in the night when he has his wagons loaded with ice ready to be hauled to Boston, B attaches the same in a suit on a promissory note on which A claims he owes nothing, and B

[31] Spencer & Newbold's Appeal, 80 Pa. 317.

[32] Clark v. Pinney, 6 Cow. (N. Y.) 297.

[33] Jack v. Fiddes, Mor. Dict. 2923.

[34] Richardson v. Duncan, 3 N. H. 508.

tells A not to move the wagons until he pays $300. To release his property, A pays the $300. Can he recover the same in a suit for money had and received? Yes. If B fraudulently and knowing he has no just claim seizes the goods of A for the purpose of extorting the money, this is duress of goods.[35]

(2) A owns a building which has just been erected and he wants to place a mortgage upon it but cannot without paying off a lien for an unfounded claim which B causes to be filed, and he pays the amount of this lien under protest. Can he recover the same? Yes. This is duress of circumstances. The payment is involuntary.[36]

(3) A threatens to take B's life unless he will pay him $1,000 and because of the fear exerted by the threat B pays A the money. Can he recover it in an action ex contractu? Yes. The duress makes this payment involuntary and it belongs in equity and good conscience to B.[37]

§ 16. A benefit belongs, in equity and good conscience, to another if conferred because of reliance on a contract which is deviated from by consent.

ILLUSTRATIONS.

(1) A enters into an agreement with B to dig a tail race for a mill for B according to certain specifications. A does work, some according to the contract, and some not in accordance with the contract. It is not shown whether the contract is modified by mutual consent. Can A recover in quantum meruit? Only, first, if B prevents execution; second, if the whole or part of the contract is modified and substituted parts are performed.[38]

§ 17. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract which is not strictly complied with, though substantially performed.

ILLUSTRATIONS.

(1) A agrees to sell B 250 bushels of grain, to be delivered within six weeks. A delivers 130 bushels and the time for completion of the contract expires without B returning the 130 bushels. Can A recover the value thereof? Yes, but B has an action for damages for breach of

[35] Chandler v. Sanger, 114 Mass. 364.

[36] Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217.

[37] Brown v. Pierce, 74 U. S. (7 Wall.) 205.

[38] Helm v. Wilson, 4 Mo. 41; Wheeden v. Fiske, 50 N. H. 125.

contract. Recovery should be allowed only for the excess of benefit over the damage occasioned.[39]

(2) A agrees to build a church for B and in building it he inadvertently builds the sills lower and the windows smaller than the plans and specifications ordered. It is reasonably adapted to the use for which it is built and B is in beneficial use of it. Can A recover for the work and materials? Yes, because the contract though unenforcible because of this breach is, yet, substantially complied with; and B cannot here deduct the amount it would take to build the church according to the contract as it would cost all A's labor is worth.[40]

§ 18. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract which has lapsed because of the happening or not happening of a condition express or implied.

ILLUSTRATIONS.

(1) A pays B $1500 freight on a cargo of shell and wood lost at sea by the wreck of the ship carrying it. Is A entitled to recover the freight paid? Yes. The freight is paid for the carriage of the goods to their destination and the delivery there is a condition precedent to recovery. The policy of the rule is to take away the temptation to misconduct and carelessness.[41]

(2) A buys and pays for a chaise and horse on condition that they can be returned if his wife does not approve. His wife does not approve of the transaction and he returns them. Can he recover money paid? Yes. The contract is ended by the happening of the condition and now the prospective seller holds money which it is against conscience for him to keep.[42]

(3) A buys bonds from B and sells them again to C but they turn out worthless because not stamped. A refunds to C. Can he recover what he pays B? Yes. There is an implied condition that the thing is what it is sold for. Consideration has failed.[43]

(4) A orally agrees to buy a house and estate for $3700 from B and pays the latter more than the purchase price and carries furniture into the house. The house is consumed by fire. Can he recover the money paid? Yes. On account of the statute of frauds, title has not passed and it is a condition of the contract that the subject of the sale shall

[39] Oxendale v. Wetherell, 7 Law J. K. B. (O. S.) 264.

[40] Pinches v. Swedish Evangelical Lutheran Church, 55 Conn. 183, 10 Atl. 264.

[41] Reina v. Cross, 6 Cal. 29.

[42] Towers v. Barrett, 1 Term R. 133.

[43] Young v. Cole, 3 Bing. N. C. 724.

continue to exist, and, it having been destroyed, A is entitled to recover. The contract cannot be enforced against A and the destruction of the property excuses his default.[44]

§ 19. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract whose performance is prevented because of default by the other party.

ILLUSTRATIONS.

(1) A pays money to B for stock which B refuses to deliver according to his contract. Can A sue in quasi contract for the money? Yes. B is estopped to set up the express contract.[45]

(2) A bids off at auction and pays $17 for a cow and 400 pounds of hay. He takes the cow at the time, but when he demands the hay it is refused, on the ground that it has already been used. Can A recover the value of the hay in suit for money had and received? No. Before he can recover in this sort of a suit he must rescind the express contract, and the latter being an entire contract must be rescinded in toto, if at all. A should sue in conversion or for breach of the express contract or, if he desires to sue in quasi contract, he should disregard the express contract, return the cow, and sue for $17.[46]

(3) A is employed by B to manage an hotel for a year and works over eight months when he is discharged. He sues for breach of contract and also in quantum meruit for the value of his services. Can he recover on either count? He may recover on either count, but not upon both; by electing to drop the count for breach of contract, he may recover in quantum meruit.[47]

§ 20. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract whose performance is prevented by act of God, inevitable accident or public authority.

ILLUSTRATIONS.

(1) A and his wife agree to live in B's house and to care for her during her life for the rent of the house and eight dollars per month, and the promise to give them the house at her death. After a few years

[44] Thompson v. Gould, 37 Mass. (20 Pick.) 134.

[45] Anonymous, 1 Strange, 407.

[46] Miner v. Bradley, 39 Mass. (22 Pick.) 457.

[47] Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.

A's wife dies, and B terminates the contract for that reason. Can A recover in quantum meruit the value of his services? Yes. B should not retain benefits and make no return when the contract is terminated by the act of God.[48]

(2) A has contracted to dig a canal and hires B to do part of the work. During the progress of the work, it is stopped and the contract annulled by state authority. Ten per cent of the price to be paid B is reserved until final estimation. Is B now entitled to this ten per cent reserved on the work done? Yes. He is entitled to recover in quasi contract, but the contract price gives the measure of damages.[49]

(3) H has contracted with B to make and put up certain pews in a church which is being built by B. When they are all made and in the building, but only part of them put up, the church and pews are burned by accidental fire. Can H recover their value? Yes. This is not an undertaking to build something new but to add something to the property of B and there is an implied obligation on him to keep up the building.[50]

(4) A agrees to work for B for one year. At the end of six months, he is disabled. Can he recover for the work already done? Yes. He may recover the value of his services during the six months. There is no action on the contract, and if B pays nothing for the services he is unjustly enriched.[51]

§ 21. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract, unenforcible because of lack of authority in the party making the contract.

ILLUSTRATIONS.

(1) A buys a quantity of cotton from B and pays 509 pounds too much, by a mistake in adding up the figures. Both parties are acting for undisclosed principals and B credits the amount received to his principal. Can A recover the 509 pounds from B? Yes, as he acted as principal. It is not a case of an agent acting for a principal and turning the money over to him.[52]

(2) A contracts to construct a dam across a river for B who is acting as agent for C. C has given no authority to B to make such a contract but the work is performed by A and is used by C. Can A recover the value of the benefit received? Yes.[53]

[48] Parker v. Macomber, 17 R. I. 674, 24 Atl. 464.

[49] Jones v. Judd, 4 N. Y. (4 Comst.) 411.

[50] Haynes v. Second Baptist Church, 12 Mo. App. 536.

[51] Wolfe v. Howes, 20 N. Y. 197; Green v. Gilbert, 21 Wis. 395.

[52] Newall v. Tomlinson, L. R. 6 C. P. 405.

[53] Van Deusen v. Blum, 35 Mass. (18 Pick.) 229.

(3) A lends money to a town on notes made by the town treasurer on behalf of the town, without authority from the town. If the money is applied to the legitimate uses of the town, as for the payment of claims against it, can A recover the amount of the loan? Yes.[54]

§ 22. A benefit belongs, in equity and good conscience, to another if it is conferred by him under a contract which is subsequently avoided because of the incapacity of a party thereto.

ILLUSTRATIONS.

(1) A hires B, a minor, to work for him for three years, grinding bibs at nine cents a piece. After working a short time, B quits the service, ignoring his express contract. Can he bring action in quantum meruit and recover for the work already done? Yes, the law gives him the right to avoid this express contract and, having avoided it, he is entitled to pay for the services rendered the other party.[55]

(2) A hires V, a minor, for a whole sea voyage. After two years of the voyage V deserts the ship without any sort of a reason. Can V recover the value of his services in an action of quantum meruit? Yes. An infant's disaffirmance of a voidable contract takes effect ab initio and, therefore, the parties stand just as though they had never made a contract, but A has the benefit of V's services and in equity and good conscience should pay therefor.[56]

(3) A sells chattels to B, a corporation, when the corporation, under its charter, does not have authority to make the purchase but it accepts and uses the chattels. Can A recover the value of the chattels, in a suit in quasi contract? Yes, the contract is invalid because of the incapacity of the corporation making it, but it would be inequitable to allow it to keep the benefits without compensating A for them.[57]

§ 23. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract, unenforcible because not in conformity to the requirements of the statute of frauds.

ILLUSTRATIONS.

(1) A agrees orally to sell B four acres of land for forty dollars, to be paid for in work. After the agreement is made B takes possession and

[54] Billings v. Inhabitants of Monmouth, 72 Me. 174.

[55] Gaffney v. Hayden, 110 Mass. 137.

[56] Vent v. Osgood, 36 Mass. (19 Pick.) 572.

[57] Parish v. Wheeler, 22 N. Y. 494; Bissell v. Michigan Southern and Northern Indiana R. Cos., 22 N. Y. 258; Slater Woollen Co. v. Lamb, 143 Mass. 420, 9 N. E. 823.

erects a house and develops the land. A then conveys the land to C for $100. Can B recover the value of his work and materials furnished? Yes, B may treat the agreement as a nullity, except as to giving him permission to work.[58]

(2) In consideration of B's promise to give A the right, from then forward, to feed live stock carried on its railroad, A conveys land to B for yards. B allows A to feed for one year in which he clears $6,000, or more than the value of the land, and then B refuses to go on with the agreement. Can A recover the value of the land? No. The contract, being void under the statute of frauds cannot be enforced, but B having received the land, A could recover the value of the same; but he must allow credit for money received by himself. As this is more than the value of the land, he cannot, therefore, recover in his action.[59]

§ 24. A benefit belongs, in equity and good conscience, to another if conferred in reliance on a contract, unenforcible because an essential element of the contract is lacking.

ILLUSTRATIONS.

(1) A buys land of B, but there is no land of the description contained in the deed. Can the money paid B be recovered? Yes. Evidence of mistake, imposition or deception, is sufficient to maintain assumpsit for money had and received.[60]

(2) A is a cotton dealer. He writes B "I will sell you 100 bales of cotton at fifty cents a bale." B replies, "Send me fifty bales immediately." A ships B the fifty bales, which the latter accepts and uses. The market price of cotton at the time is fifty-five cents per bale. How much should A recover from B? Fifty-five cents per bale. By qualifying A's offer, B does not accept it, so that there is no express contract; but he is under obligation to pay the reasonable value of the cotton, because it is sent to him at his request.[61]

§ 25. A benefit belongs, in equity and good conscience, to another if conferred because of mistaken reliance on the ownership of chattels or land.

ILLUSTRATIONS.

(1) A purchases an estate, which comes to him by intermediate conveyances, from an administration sale which is defective, but A

[58] King v. Brown, 2 Hill (N. Y.) 485.

[59] Day v. New York Cent. R. Co., 51 N. Y. 583.

[60] D'Utricht v. Melchor, 1 Dall. (Pa.) 428.

[61] Rommel v. Wingate, 103 Mass. 327.

thinks he has a perfect title and makes permanent improvements. B gets the land from A. Can A recover for improvements from B? Yes. In the United States this right is generally established by statutes known as "Betterment Acts." It is also an equitable right. At law prior to adoption of the equitable rule, it has been generally held that there is no obligation because the person receiving the benefit has no chance to elect whether or not he will take the same.[62]

(2) A buys a share of stock from an insolvent trustee and spends large sums of money in realizing on it. Later it develops that he gets no title and the original owner, B, recovers the proceeds of the share. Can A recover the value of his services and expenses? Yes. First, because as trustee in law for the true owner, he does only his legal duty; second, because these are improvements made by a bona fide occupier.[63]

(3) A, by mistake, cuts timber on B's land, and by his labor increases it in value almost two-fold. D takes the timber in its improved condition. Can A recover the value of his labor? Yes. D has received a benefit for which in equity and good conscience he ought to pay.[64]

§ 26. A benefit belongs, in equity and good conscience, to another if conferred because of mistake as to duty.

ILLUSTRATIONS.

(1) A, being one of the Colemeters of London, pays rent, by mistake, to the mayor instead of the chamberlain of the city, the common council of London having changed the method. A afterwards pays the chamberlain. Can he recover what he pays to the mayor? Yes.[65]

(2) A bank of Ohio pays D money on a time draft, illegal by the statutes of New York. Can the bank recover the money paid in an action for money had and received? Yes. This is a mistake of foreign law and is a mistake of fact.[66]

(3) A is the owner of Lot 28, on which there is an assessment for paving the street. He receives notice of the assessment on Lot 27 and, thinking it refers to his own lot, pays it. Can he recover the sum so paid? Yes, this is a mistake of fact, and the party receiving the money has not changed his position so that it will be inequitable to allow a recovery.[67]

[62] Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1, 875; Griswold v. Bragg, 48 Fed. 519.

[63] Williams v. Gibbes, 61 U. S. (20 How.) 535.

[64] State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81.

See, also, Isle Royale Min. Co. v. Hertin, 37 Mich. 332.

[65] Bonnel v. Foulke, 2 Sid. 4.

[66] Bank of Chillicothe v. Dodge, 8 Barb. (N. Y.) 233.

[67] Mayer v. City of New York, 63 N. Y. 455.

§ 27. But benefits received by one person do not belong, in equity and good conscience, to another if conferred without expectation of reward, or with expectation of reward but without request or subsequent acceptance, or on a demand of right, or under a misapprehension of legal rights, or upon a demand unjustly made with knowledge of all of the facts.

In the foregoing sections have been explained the grounds which make benefits received by one person belong in equity and good conscience to the person conferring them. It remains to consider the grounds which make it inequitable and against conscience for the party conferring benefits to recover for them, and first of benefits conferred voluntarily. If a man gives away, or takes his chances as to whether he is giving away, his goods, instead of being equitable, it would be most palpably inequitable to permit a recovery for their value. So, where a man has an option to litigate a question when a demand is made, it would be a mistake and unjust to allow him to acquiesce for the time being, but be at liberty to change his mind and open up the matter any time within the statute of limitations.

ILLUSTRATIONS.

(1) A, a young man, makes valuable presents to a young lady whom he is addressing with a view to marriage. He does this in order to gain her favor. Can he recover the value of the presents? No. Like all other adventurers, he must run his risk.[68]

(2) A makes a contract with B to furnish him ice, but B sells out to C, and C supplies ice to A, who uses it thinking it is furnished by B. Can C recover for the ice from A? No. A has received a benefit, but C is an officious intermeddler, and, as A has no opportunity to accept after discovering who furnishes the ice, there is no reason in equity and good conscience for permitting a recovery.[69]

(3) A performs certain work for B, as a friend, expecting to be remembered in B's will, but nothing is given him by the will. Can A now recover in quasi contract for work and labor? No.[70]

[68] Robinson v. Cumming, 2 Atk. 409.

[69] Boston Ice Co. v. Potter, 123 Mass. 28.

[70] Osborn v. Governors of Guy's Hospital, 2 Strange, 728.

(4) A, under the impression that he is bound to do so, pays a water company a rate in excess of what the House of Lords holds legally due. Can he recover the excess? No. This is a mistake of law. The reversal of a decision otherwise might give rise to hundreds of actions. It is thought by some that the doctrine of mistake of law should have been confined to crimes.[71]

(5) A is suing B for dower in realty, warranted by C. A has already executed a release which she has forgotten, but which C thinks exists. The suit is compromised by C paying A $1,000. The release is then found. Can C recover the $1,000 from A? No. This is a voluntary payment, and is neither a mistake of law nor of fact.[72]

(6) A buys from B a lot and part of another lying between Water Street and Sand Creek, the distance on the plat being given as 80 feet, though the actual distance is 110 feet. B later claims that the lots only extend back 80 feet, and A pays him for a quitclaim deed for the 30-foot strip. Legally the original deed covers all of the 110 feet. Can A recover the money paid for the second deed? No. This is a mistake of law.[73]

(7) A suffers judgment to be entered against him for goods sold and delivered although he has a receipt acknowledging satisfaction in full, but he has mislaid this receipt. Later he finds the receipt and sues in quasi contract to recover the money. He is not entitled to recover, as the proper course for him is to prevent the entry of the first judgment.[74]

§ 28. Whenever the transaction, by which one person confers a benefit upon another, is illegal, because against morality or public policy (malum in se), the parties are in pari delicto, and the law will create an obligation in favor of neither; but, where the act is prohibited by statute for the purpose of protecting a set of men (malum prohibitum), if the parties are not in pari delicto because equal in guilt, or if the contract is executory, the law will afford relief to the more innocent party.

There is no ground for allowing one wrongdoer to recover from another the value of the benefits conferred by

[71] Henderson v. Folkestone Waterworks Co., 1 Times Law R. 329.

[72] Mowatt v. Wright, 1 Wend. (N. Y.) 355.

[73] Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567.

[74] James v. Cavit's Adm'r, 2 Brev. (S. C.) 174.

his own wrongful act. A guilty party should not be allowed to appeal to the law for indemnity, for he has placed himself without its pale by condemning it, but, if he is innocent of illegal purpose, or has acted under circumstances of imposition, hardship, or undue influence, there is sufficient reason for allowing a recovery.

ILLUSTRATIONS.

(1) A's son is arrested and charged with passing counterfeit money to B, and A pays B thirty dollars to settle the criminal prosecution, and B lets the prisoner go. Can A recover the thirty dollars? No. Because of his own moral turpitude.[75]

(2) Eight hundred and forty pounds are recovered from one of two joint tort feasors. Will contribution lie? No. There is no contribution between joint wrongdoers.[76]

(3) A and B are owners of a stage; B is driving the same. Through B's negligence C is injured and C recovers $1,300 damages from A. Can A compel contribution from B? Yes. A is guilty of no personal wrongdoing.[77]

(4) A deposits money with the F Bank, which promises to pay it on a day certain, contrary to statute. Can A recover the money? Yes. The express contract is void, but A can recover on an obligation implied by law as, first, the transaction is simply malum prohibitum and does not involve moral turpitude, and A is not, therefore, in pari delicto, and, second, the contract is executory. So, in all cases where the express contracts are not illegal but are void because contrary to the policy of the law or prohibited.[78]

(5) A pays a matrimonial agency fifty dollars to procure a husband for her. Can she recover the money? Yes. She is not in pari delicto, as the matrimonial agency may be regarded as exercising a species of imposition or undue influence. The necessity of supporting public interests really demands this holding.[79]

(6) A, as agent for B. receives money from various parties, which money B could not have collected because of illegality. Can B recover it from A? Yes. On payment it becomes B's money and the law implies an obligation to pay it over. There is no illegality in this quasi contract. Likewise, a stakeholder is bound to pay over to his depositor

[75] Daimouth v. Bennett, 15 Barb. (N. Y.) 541.

[76] Merryweather v. Nixan, 8 Term R. 186.

[77] Bailey v. Bussing, 28 Conn. 455.

[78] White v. Franklin Bank, 39 Mass. (22 Pick.) 181.

[79] Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343.

money deposited with him, if notified to do so before paying it to winner, and a broker may recover his commission if innocent of intent to gamble.[80]

§ 29. The fact that the party receiving the benefit has changed his position, or that the benefit has been conferred because of the negligence of the other party, is no bar to a recovery, unless the party benefited has changed his position, without knowledge or reason to know of the real fact, so that to allow a recovery would be inequitable.

One ought not to throw on another a loss occurring, without the other's fault; but, if the loss can be traced to a fault or negligence of the other party, it should be forced on him.

ILLUSTRATIONS.

(1) J pays a note, on which his name has been forged, to the C bank, which negotiates it. After discovering the forgery, can J recover from the bank? No. The maker of the note is supposed to know his own signature. Therefore, he is negligent and it would now be inequitable on the bank to allow recovery, as the indorsers are discharged.[81]

(2) A pays to B a bill, drawn on him by a forger and endorsed to B, a bona fide purchaser. Can A recover the money paid B? No. B is entitled to the protection of the court as much as A, as their equities are equal.[82]

(3) A pays money to B, as agent for C, upon a policy of insurance, and B gives C credit on an old account. The loss is not fair. Can A recover the amount paid from B? Yes. B has not changed his position.[83]

(4) An insurance company, through a mistake of its directors, who forgot that the policy has lapsed, pays the amount of a life insurance policy. Can the money be recovered? Yes. The company may recover after allowing a deduction for the amount to which the insured is equitably entitled. The negligence of one party will not prevent his recovery unless the other party is placed in such a position that to allow a recovery would be inequitable.[84]

[80] Baldwin Bros. v. Potter, 46 Vt. 402; Hampden v. Walsh, 1 Q. B. Div. 189.

[81] Johnston v. Commercial Bank. 27 W. Va. 343.

[82] Price v. Neal, 3 Burrow, 1354.

[83] Buller v. Harrison, Cowp. 565.

[84] Kelly v. Solari, 9 Mees. & W. 54.

§ 30. Innocent third parties are protected against suits in quasi contract, where the benefits, which have come into their possession under voidable contracts, consist of money or commercial paper, or conveyances of record; and they are always protected where the benefits are obtained in the first instance by means of fraud or undue influence, except as against infants or insane persons.

The law considers that it is better that money or negotiable security should carry on its face its own credentials. The reason for protecting the holder of conveyances of land lies in the sanctity given to the registry system. The party who allows himself to be defrauded is at fault to such an extent that he ought to suffer rather than the innocent party who is not at all at fault. Innocent third parties are not protected against infants because of the arbitrary rule of law to protect infants in all cases. Before an insane person, however, can recover from a third party, he must place him in statu quo.

ILLUSTRATIONS.

(1) An insurance company pays the amount of a loss, under a fire policy, to an assignee, to whom the insured assigns the policy. The assignee takes the money in payment of a debt due from the insured. The property is burned by the insured and the proofs are false and fraudulent. Can the company recover from the assignee? No. The insured alone is liable. The assignee holds no money that he is not entitled to keep. It is the same thing as though the company should pay the insured, and the insured should pay the assignee his debt.[85]

(2) A pays to B bills drawn on him by a forger and indorsed to B, who is a bona fide purchaser. Can A recover from B the money paid him? No. B is entitled to the protection of the court as much as A, as their equities are equal.[86]

(3) A, by fraud, gets B to sell him a team of horses for half of their value and then sells them to C, an innocent third party. Can B recover from C? No. It is the policy of the law to protect innocent third parties. The one who allows himself to be defrauded in the transaction is at fault to such an extent that he ought to stand the loss rather than one not at all at fault. B must seek redress from A.[87]

[85] Merchants Ins. Co. v. Abbott, 131 Mass. 397.

[86] Price v. Neal, 3 Burrow, 1354.

[87] Paige v. O'Neal, 12 Cal. 483.

(4) A, an infant, buys land of B, giving in payment twenty head of cattle. B sells the cattle to C, an innocent third party. After becoming of age, can A avoid his contract and recover the cattle, or their value, of C? Yes. It is the policy of the law to protect infants, and this will be done in preference to innocent third parties.[88]

§ 31. The amount refunded in a suit in quasi contract is always the value of the net benefit received by the other party. The benefit is determined by the reasonable value of the advantage conferred, the net benefit by deducting therefrom any counterclaim existing in favor of the party benefited.

The one conferring the benefit, or sustaining the loss, should recover only that to which, in conscience and equity, he is entitled, which can be no more than what remains, after deducting all just allowances, which the party benefited has a right to retain, from the money or chattels received or the equivalent thereof. As the party suing in quasi contract must place his right to recover upon equitable grounds, if he would have equity, he must do equity.

ILLUSTRATIONS.

(1) An insurance company pays a loss on a policy of fire insurance. Then the company discovers that the proofs of the loss are fraudulent and sues to recover the entire amount paid. If the insured is honestly entitled to anything, the company can recover only the difference between that amount and the entire amount paid.[89]

(2) A works for B as watchman, being employed by B's agent. A thinks he is working for three dollars for twenty-four hours and B thinks he is working for one dollar and a half. What can A recover? Reasonable compensation, for it would not be right to allow him to recover the three dollars, or the one dollar and a half, but he is entitled to something. The law disregards the understanding of both parties, and determines the amount which A ought to receive.[90]

(3) A collects money for B, as his agent, and retains forty pounds for his services. Then B sues for money had and received. Can A show that this is a reasonable allowance without pleading it as a set-off? Yes, for in this suit a party can recover only that to which he is in conscience entitled.[91]

[88] Hill v. Anderson, 13 Miss. (5 Smedes & M.) 216.

[89] Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104.

[90] Turner v. Webster, 24 Kan. 38.

[91] Dale v. Sollet, 4 Burrow, 2133.

§ 32. Where there is a valid express contract, the law will not imply an obligation ex contractu; and where there is an entire contract, and a party performs a part of it, and then, without legal excuse and against the consent of the other party, refuses to perform the remainder, no obligation to pay for the part performed is created by law.

A quasi contractual obligation will not be created where there is a valid express contract, but it may arise where the contract is voidable because of incapacity of parties, or because of fraud or duress, or undue influence; or where the express contract is broken by default of the other party, or where the express contract is unenforcible under the statute of frauds, or where the party suing has a legal excuse for his own breach of contract. It is a principle of the common law to encourage private contracts, and when the parties have entered into contractual relations, the law will not disturb them, in the absence of some vitiating circumstance. Until the express contract is avoided or rescinded, the injured party has no right to a suit for its breach. The law will not make a better obligation for the parties than they have made for themselves, but, when no contract has been made or, for reasons of justice, a contract made should be brushed aside, a great many situations arise where obligations ought to exist and these are supplied by force of law alone. The object of allowing a recovery in quasi contract, when there is some form of contract subsisting, is not to better the condition of the one suing but to prevent the other party from enriching himself by his own wrongful act.

ILLUSTRATIONS.

(1) A is keeping a mare for B, until B calls for her, and raises a colt from her and hires C to keep and train the colt. Is B liable to C for board and shoeing of the colt? No. C must look to A with whom he has a valid express contract.[92]

(2) C agrees to work for M for one year for $300, payable monthly. He works six months, at the end of which time he is discharged without

[92] Cahill v. Hall, 161 Mass. 512, 37 N. E. 573.

excuse. M has paid C $25 per month. Can C recover in quantum meruit for the work done? Yes. When M rescinds his contract, he puts it out of his power to enforce it against C, and when M refuses to execute a part of the contract, C has a right to rescind the whole. Allowance should be made for money paid by M.[93]

(3) A agrees to work for B ten and one-half months for three cents for each run of yarn spun for him. After working eleven weeks he leaves. Can A recover the value of his services? No. This is an entire contract and performance is a condition precedent. The services would have been of more value in the last part of the period.[94]

(4) A hires out to work for B for one year, and during the year is discharged for misconduct. Can he recover pro rata the value of his services? No. Because his discharge is occasioned by his own violation of duty. Some courts would allow A to recover in quantum meruit, and give B a counterclaim for any damages he has sustained by breach of the express contract; but, on principle, this is wrong.[95]

§ 33. The doctrine which permits a recovery in quasi contract, when a benefit has been acquired by a tortious act, is known as election of remedies; for the party injured may sue either in contract, or in tort, but having elected to sue in one, he cannot sue in the other.

If the tort remedy is elected, a judgment satisfied passes title, so that the former owner cannot sue again in contract to recover the value of the benefits. If the contract remedy is elected, the former owner treats the transaction as though it were a contract, and he should not afterwards be permitted to gainsay this by calling it a tort.

Originally the only remedy of one who had suffered from the tortious act of another was an action of tort, the doctrine being that what was a tort in its inception could not be made the foundation of an implied assumpsit; but, through the application of the doctrine of estoppel, where the wrongdoer has by his act acquired a benefit, as by the appropriation of the services of an apprentice, or money, or goods, the one conferring the benefit is now allowed to waive dam-

[93] Clark v. Manchester, 51 N. H. 594.

[94] McMillan v. Vanderlip, 12 Johns. (N. Y.) 165.

[95] Turner v. Robinson, 5 Barn. & Adol. 789; Stark v. Parker, 19 Mass. (2 Pick.) 267. Contra, Britton v. Turner, 6 N. H. 481.

ages for the tort and sue for the value of the benefit in an action ex contractu.

What amounts to an election is a question of some difficulty. In order to make the election binding the suits in tort and contract must involve the same subject-matter, the best criterion of which is whether the same evidence will maintain both. If they involve the same subject-matter, the institution of proceedings ex contractu or ex delicto, as the case may be, will be an election, according to whether the particular court will thereafter permit the amendment of pleadings so as to change the cause of action, or will permit the discontinuance of one cause of action and the beginning of another. But a judgment in either suit, rendered on the merits, is a bar to all other suits, for it is a maxim of the law that one shall not be twice vexed for the same debt. The peace and quiet of the state require that the court shall be acquainted with everything that it is necessary for it to know in order to pronounce a judgment answering the claims of justice and, when a judgment has been finally rendered, that should end the dispute.

ILLUSTRATIONS.

(1) A's testator and B are tenants in common of a lot, and B cuts and sells some of the wood thereon, receiving payment partly in cash and partly in real estate. Will assumpsit lie for money had and received? Yes. For one-half of the amount for which the wood is sold, as A has a right to waive the action of trespass. It is the same thing as though B had sold all the wood for cash and reinvested the money.[96]

(2) C obtains judgment against A for 2,000 pounds money lent. Execution issues and the sheriff levies on and sells goods of A to D for over 2,000 pounds. A becomes a bankrupt and H is appointed assignee, and sues the sheriff and C in trover for taking the goods of A. Judgment is entered for the sheriff and C. Can H now sue C for money had and received? No. The first action determines that the goods did not belong to the assignee. He cannot now try whether the money produced by those goods is his.[97]

(3) A sues B in trespass, but on demurrer the declaration is adjudged bad. Can A sue B again for the same cause of action? Yes.

[96] Miller v. Miller, 24 Mass. (7 Pick.) 133.

[97] Kitchin v. Campbell, 2 Wm. Bl. 827; Marsh v. Pier, 4 Rawle (Pa.) 273; Huffman v. Hughlett, 79 Tenn. (11 Lea) 549.

A judgment to be a bar to another suit must be rendered on the merits. The case as stated in the second suit is not tried in the first.[98]

§ 34. Where benefits are conferred on each other by the members of a family living as one household, the presumption is that they are intended to be gratuitous, and a legal obligation will arise only when the contrary is conclusively established.

The household is presumed to abound in reciprocal acts of kindness and good will.

ILLUSTRATIONS.

(1) A works for B for many years, they either being married or living in a state of concubinage, and after B's death A attempts to recover compensation. Should recovery be allowed? No. The relation which they bore is inconsistent with any understanding for compensation.[99]

(2) A, upon the marriage of her mother with B, goes to live in her stepfather's family, as one of his own children, but while there is made to work very hard by her stepfather. After becoming of age, can she recover the value of her services? No. The stepfather stood in loco parentis, and the child cannot demand wages from a parent, as neither contemplates remuneration.[100]

§ 35. Infants and persons non compos mentis are not under obligation to pay for benefits received, unless they are what are classed as necessaries.

These persons are incapacitated by law from entering into valid contracts and, hence, cannot be held liable on their agreements. If they are to be bound at all, it must be in quasi contract, for it is just as though they had never entered into any agreement; but the law does not consider that they ought to be held liable for anything not necessaries. The exception in the case of necessaries is for the protection of the incapacitated person, and it does not apply if he has a parent or guardian ready to supply them.

[98] Wilbur v. Gilmore, 38 Mass. (21 Pick.) 250.

[99] Swires v. Parsons, 5 Watts & S. (Pa.) 357.

[100] Lantz v. Frey, 14 Pa. 201; Donahue v. Donahue, 53 Minn. 460, 55 N. W. 602.

ILLUSTRATIONS.

(1) C sells goods to L, an infant, on the latter's representation that he is of age. The goods are not necessaries. Is the infant bound to pay the purchase price for them? No. An infant is not under obligation to pay for benefits received unless the benefits are necessaries, and he is not estopped from setting up his infancy because of his misrepresentation as to his age. It is the policy of the law to protect infants. C may recover possession of any of the goods remaining in specie.[101]

(2) A step-father furnishes necessaries to his step-son, a minor, at the latter's request, but without any express promise on his part to pay for them. Is the step-son liable in quasi contract? Yes.[102]

(3) A furnishes necessaries to B, an insane person, when such person is not otherwise provided for. Can A recover the value of the things furnished in an action ex contractu? Yes. An insane person, like an infant, is under obligation to pay for necessaries.[103]

(4) A minor has a guardian ready and willing to supply his wants, but agrees with B to be his apprentice in a tailor shop, for B's promise to supply him with necessaries. Can B recover from the minor the value of the supplies furnished? No. A minor cannot bind himself for necessaries when he has a guardian willing to supply them.[104]

§ 36. Necessaries are things for the personal advantage of a person of incapacity, which are not supplied him by his parent or guardian, and without which he cannot reasonably exist as a physical and intellectual being.

ILLUSTRATIONS.

(1) A, a minor, away from home attending college, agrees to lease a room from B for forty weeks at the rate of ten dollars per week, and enters into possession and occupies the room for ten weeks, when he gives up possession and ceases to occupy the same. Is he liable for all or any part of the agreed rent? He is bound to pay the reasonable value of the use of the room for the ten weeks he occupies it, as lodging is something without which a person cannot reasonably exist, and must be classed as a necessary, but he is only obliged to pay for the reasonable value of a room suitable and proper for a person of his station in life. He is not under legal obligation to pay for the room during the time he does not occupy it, as a minor cannot make a bind-

[101] Conrad v. Lane, 26 Minn. 389, 4 N. W. 695.

[102] Gay v. Ballou, 4 Wend. (N. Y.) 403.

[103] Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761.

[104] Guthrie v. Murphy, 4 Watts (Pa.) 80.

ing executory agreement to purchase necessaries. The law alone raises the obligation after the benefits have been received.[105]

(2) An undertaker furnishes funeral supplies for a deceased husband of A. Is this a necessary? Yes. It is a necessary. It is something without which a person cannot reasonably exist and it is a personal advantage to A because of the principal that husband and wife are one.[106]

§ 37. Whether a specific thing belongs to the class of necessaries is a question of law for the court, but whether a thing belonging to the class of necessaries is a necessary for a particular person in a particular case is a question of fact for the jury, and is to be determined by having regard to the person's condition, estate and circumstances in life.

ILLUSTRATIONS.

(1) A furnishes B, a minor, with an antique chased goblet, which B intends to give to a friend, and some diamond solitaires, to be used as a fastening for the wrist bands of his shirt. Who should determine whether these are necessaries? The court should determine whether they can ever be necessaries for any infant and, accordingly, should decide that the goblet can never be a necessary but that the solitaires may be. The jury should decide whether the diamond solitaires are a necessary for this particular infant, taking into consideration his station.[107]

(2) A furnishes money to B, a minor, to pay his traveling expenses to California. B has a guardian ready to provide everything suitable to his age and station in life. Is it a question of law or of fact as to whether A can recover from B? Law. The court should decide that this is not a necessary.[108]

(3) A furnishes a horse, saddle, bridle and traveling expenses to B, a minor, 180 miles from home, to enable him to make his journey homeward. What are the respective functions of the court and jury in deciding whether the minor is liable to pay for these chattels? The court should decide whether the articles belong to those classes for which any infant is bound to pay, and if they fall within those classes, then, whether they are necessary and suitable considering the estate of this particular infant, and what is a reasonable price therefor should be left to the jury.[109]

[105] Gregory v. Lee, 64 Conn. 407, 30 Atl. 53.

[106] Chapple v. Cooper, 13 Mees. & W. 252.

[107] Ryder v. Wombwell, L. R. 4 Exch. 32.

[108] Henderson v. Fox, 5 Ind. 489.

[109] Beeler v. Young, 4 Ky. (1 Bibb) 519.

§ 38. **Whenever, without any agreement of the parties, an obligation is imposed by law on one person to do certain positive acts for another, the law implies an obligation on the former to compensate the latter for any damage he may sustain by misperformance, or nonperformance, of the obligation, and the damages may be recovered in an action ex contractu.**

The quasi contractual obligations heretofore considered have rested on the doctrine that one man's gain should not be another man's loss, but there are some quasi contractual obligations which do not rest upon this doctrine but are positive obligations of the law. The latter include cases where a person is bound to do particular acts other than to pay for benefits received.

§ 39. **Statutes sometimes impose obligations on one person to do certain positive acts for another.**

ILLUSTRATIONS.

(1) A is a pilot, licensed to pilot vessels into the port of New York. A statute of New York provides that any pilot bringing his vessel in from sea shall be entitled to pilot her out to sea again, when she leaves. B employs A to pilot his vessel into New York, but goes to sea again without a pilot. Is A entitled to recover damages for the loss sustained? Yes. An obligation to employ and pay him is created by statute.[110]

§ 40. **American law generally imposes an obligation on a promisor to do an act promised for a third person, in a contract made upon a valid consideration, where either the contract is made for the sole benefit of the third person or the promisee is at the time under an existing legal obligation to the third person.**

This obligation is difficult of explanation. While a valid contract exists between the promisee and promisor none exists between either of these parties and the beneficiary or the creditor of the promisee. The difficulty arises in finding a

[110]The Francisco Garguilo, 14 Fed. 495; Milford v. Com., 144 Mass. 64, 10 N. E. 516.

remedy for the latter on the contract between the former. No property rights are transferred. No relation of agency exists. There is no novation. A trust is not created. The best solution is either, simply that the third party is entitled to equitable relief, or that this relief is a quasi contract. Quasi contract is a rational explanation, for the law, operating upon the act of the parties, creates the debt, establishes the privity and implies the promise and obligation. Before the third person accepts the performance, the promisee may release the promisor at any time, but after the third person has expressly or impliedly accepted it there can be no release.

ILLUSTRATIONS.

(1) A's son and heir offers to pay a daughter 1,000 pounds if his father will not cut down a certain wood, and the father forbears from cutting the wood. Can the daughter sue the son and recover the 1,000 pounds? Yes. This promise is made for the sole benefit of the daughter, but she could not sue if the law did not imply an obligation as she is not a party to the contract.[111]

(2) A father-in-law, in consideration of the promise of a father to give his son, X, 100 pounds, promises to give X 200 pounds. Can the son, X, sue the father-in-law, or father, on the contract and recover the amount promised him? Not according to the law of England, which holds that a stranger to the consideration cannot sue on the contract though for his benefit; but generally in America, an obligation to pay the third person is created by law.[112]

(3) A deeds land to B, on his covenant to pay all incumbrances on the premises, by mortgage or otherwise. The deed declares that A's wife reserves the right of dower. The mortgage is foreclosed, and the wife loses her inchoate right of dower. Can the wife recover on B's covenant? No. It is not enough that the performance of a covenant may benefit a third person, it must be entered into for his benefit and the grantor must be a debter of the third person.[113]

(4) A owes B $2,000 and sells out his business to C, on the latter's promise to pay B. C claims the sale is fraudulent, but does not try to avoid it on that ground. Can B recover from C? Yes.[114]

[111] Dutton v. Poole, 2 Lev. 210; Williston's Wald's Pollock on Contracts, 237-278.

[112] Tweddle v. Atkinson, 1 Best & S. 393; Second Nat. Bank v. Grand Lodge of F. & A. A. M., 98 U. S. 123; Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427.

[113] Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49.

[114] Arnold v. Nichols, 64 N. Y. 117.

(5) A takes out a policy of life insurance with the B Insurance Co., and names as beneficiary C, who has no insurable interest in A's life. A dies. Can C recover the amount of the policy from the insurance company? Yes. The promisee, or his estate, though entitled to sue on the promise on the ordinary principles of contract, having suffered no pecuniary damage by the failure of the promisor to perform his agreement, cannot recover substantial damages. C must be allowed to recover or no one can recover. This is sometimes placed on the ground of a trust.[115]

§ 41. An obligation is imposed by law on several parties who are liable, in company with others, to pay their proportionate part of the whole liability, or loss, to the party or parties so liable, upon whom the whole loss has fallen or who have been compelled to discharge the whole liability.

ILLUSTRATIONS.

(1) A, B and C each enters into a separate bond for $4,000 for the conduct of D. D defaults, and A is sued, on his bond, for $3,884 and judgment obtained. Then A demands contribution from B and C. Will contribution lie between sureties on distinct obligations? Yes. The bottom of contribution is not contract but a fixed principle of justice. They all are bound to the same person and in equal right. The fact that they join in different instruments simply fixes the proportion of their liability.[116]

(2) A and B are sureties for E for the performance of a trust as guardian of C. E becomes insolvent and C requires A to pay the total amount due from the guardian. Can A compel contribution from B? Yes. And if B is dead, he can recover from B's executor.[117]

(3) A and B are owners of a stage. B is driver thereof. Through B's neglect, C is injured, and C recovers $1,300 damages from A. Can A compel contribution from B? Yes, as A is guilty of no personal wrongdoing.[118]

(4) A owns a ship and is carrying, in the same, a cargo of wheat for B. On the voyage, in order to save the vessel and cargo, it is necessary to sacrifice some of the ship's tackle, etc. Can A recover a proportion of the amount of loss from B? Yes. On the principle of general

[115] Provident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236; Ashburner, Principles of Equity, 113.

[116] Deering v. Winchelsea, 2 Bos. & P. 270.

[117] Bachelder v. Fiske, 17 Mass. 464.

[118] Bailey v. Bussing, 28 Conn. 455.

average, the ship and cargo being considered as embarked in a common peril, except as to ordinary losses.[119]

§ 42. An obligation is imposed by law on public service companies to serve all alike with adequate facilities for reasonable compensation, without discrimination.

ILLUSTRATIONS.

(1) A asks B, a common carrier, to transport certain goods for him, and tenders the freight, but B refuses to carry it though he has conveyance. Does A have any cause of action? Yes. In quasi contract, sometimes said to be in tort, for here is an obligation to carry, imposed by customary law.[120]

§ 43. In every situation where a person undertakes to act, the law imposes an obligation on him to act with reasonable care so as not to injure the person or property of others by any force set in operation by himself or his agent.

This is properly a contractual obligation because the person under liability does not owe this duty to all the world but to some person with whom he has come into privity.

ILLUSTRATIONS.

(1) A is the owner of a dry dock, used for the painting and repairing of vessels and supplies and puts up the staging necessary to enable this work to be done, but the work, thereafter, no longer remains under his control. D, a painter in the employ of C, who has a contract with the owner of a vessel to paint the same, while engaged in painting the vessel, is injured by the breaking of a rope put up by A. Can B recover from A? Yes. The law implies an obligation on him to take reasonable care to supply staging and ropes fit to be used with safety.[121]

(2) A and B are soldiers engaged in actual service. A asks B, as a favor, to care for his pocketbook containing a large amount of money. B takes the book, but through his gross negligence loses the same. Can A recover from B the value of the book and its contents? Yes. The

[119] Birkley v. Presgrave, 1 East, 220.

[120] Jackson v. Rogers, 2 Show. 327.

[121] Heaven v. Pender, 11 Q. B. Div. 503.

law implies an obligation on B to exercise slight diligence in caring for this property.[122]

§ 44. The law imposes a warranty of title on a person who sells goods as his own; and a warranty of wholesomeness on a dealer who sells provisions for immediate consumption; and a warranty of reasonable fitness on a manufacturer who makes a thing for a particular purpose; and a warranty of authority on a person who represents himself to be an agent for another.

ILLUSTRATIONS.

(1) A buys some prints of B, paying cash. Subsequently a third person, and the true owner, proves they have been stolen from him and takes them away from A. Can A recover the money paid B? Yes. On the warranty of title implied by law.[123]

(2) A is under a contract to furnish to B a certain car of building stone. The stones are to be used for paving a floor. The stones delivered are not properly dressed. Can B recover damages from A for breach of an implied warranty. Yes.[124]

(3) A professes to act as agent for B, and makes an agreement with C for a lease of a farm belonging to B. A has no authority from B, and B repudiates the lease. Can C recover from A? Yes. By assuming to act as agent, the law implies a warranty that he has authority to so act. The indorser's contract in commercial paper is somewhat like this, and is an obligation implied by law.[125]

§ 45. Where a court of competent jurisdiction adjudges a certain sum of money to be due from one person to another, a legal obligation to pay that sum is created by law, and an action of debt, or assumpsit, may be brought thereupon whether the judgment be one rendered by a court of record or not.

There is some difficulty in classifying judgments or debts of record. Originally, they seem to have been considered contracts, as they gave rise to the action of debt; but they

[122] Spooner v. Mattoon, 40 Vt. 300.

[123] Eichholz v. Bannister, 17 C. B. (N. S.) 708.

[124] Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Frazier v. Harvey 34 Conn. 469.

[125] Collen v. Wright, 8 El. & Bl. 647.

lack the essential elements of modern contracts, and in the progress of the law have gradually been relegated to the realm of quasi contract. However, a judgment based on a contract is so far treated as a contract as to come within the inhibition of the clause of the federal constitution in regard to impairing the obligation of contracts. [126]

[126] Grant v. Easton, 13 Q. B. Div. 302; Williams v. Jones, 13 Mees. & W. 628; Peerce v. Kitzmiller, 19 W. Va. 564.

CHAPTER III.

AGREEMENT.

I. Ancient essentials of contracts, § § 46-49
   A. In debt, § 47
   B. In covenant, § 48
   C. In assumpsit, § 49
II. Modern essentials of contracts, § § 50-175
   A. Agreement, § § 50-68
      1. Offer, § § 51-60
         a. Proposal to give or do something, § § 51-60
            (1) Promise or act, § 52
            (2) Communication, § 53
               (a) Time, § 53
               (b) Manner, § 53
            (3) Duration, § § 54-56
               (a) Revocation, § 55
                  (aa) Time, § 55
                  (bb) Manner, § 56
               (b) Lapse, § § 57-60
                  (aa) Prescribed time, § 57
                  (bb) Reasonable time, § 58
                  (cc) Death, § 59
                  (dd) Rejection, § 60
      2. Acceptance, § § 61-68
         a. Absolute and unconditional accession to proposal, § § 61-67
            (1) Promise or act, § 62
            (2) Communication, § 63
               (a) Manner not prescribed, § 64
               (b) Manner prescribed, § 65
               (c) Time, § 66
            (3) Revocation, § 67
         b. Effect, § 68
   B. Terms definite and certain, § 69
   C. Intention to create legal relations, § 70

§ 46. In early English law the essentials to the enforcibility of an agreement were either benefits bestowed or formalities in expression. The idea of agreement formed by offer and acceptance was unknown. A promise operated, not by way of obligation, but by way of grant.

If the law of contracts is that which enforces a promise, there was none in the early common law. Actions were

brought not to enforce promises but to get something conceived as already belonging to the plaintiff. In this state of contract law there was little to distinguish it from the modern law of quasi contract, and from the analogy between them it is reasonable to infer that the two obligations have a common source in the notion of readjustment of proprietary rights.

§ 47. If one person had the possession of a certain sum of money or of goods belonging to another, the actions of debt and detinue could be brought therefor.

Contract law doubtless started with the exchange of objects of ownership, under which circumstances proprietary rights were completely transferred. The next step in the growth of the law was probably where one party to the exchange parted with his property but the other, taking this, also kept what he should have given back. Here he had received benefits, or a quid pro quo, for which he ought to pay; and the other person was allowed to recover the same in an action of debt, if he had witnesses (jury) to swear that the property belonged to him. Thus, at first, these debts were not conceived of as raised by a promise but as rights springing from the ownership of property, but the actions of debt came to lie for any liquidated sum on a consideration executed.

§ 48. On an instrument in writing, sealed and delivered, an action of covenant could be maintained.

This action, too, began with the idea of a change in proprietary rights, but the courts in enforcing it looked only at the form. As in the action of debt, the witnesses, so here, the formalities, furnished the evidence required; but the covenant, or promise under seal, from a promise well proven, came to be a distinct form of action and just as it was said that there must be a quid pro quo in order to sustain an action of debt, because there always had been a quid pro quo, so a man who had signed, sealed and delivered an instrument, instead of being bound because he had con-

sented to be, and there was a writing to prove it, was bound because the seal implied a consideration, or quid pro quo.

§ 49. At length the action of assumpsit came to be allowed for the nonperformance of executory agreements, express or inferred, both on a consideration executed and on a consideration executory.

Failure to perform one's agreement did not create a debt, but it was a wrong for which there should be a remedy, and, from the fact that the failure to perform one's agreements bore a relation to deceit, one of the tort remedies was finally extended to cover this sort of wrong. This remedy was the action of assumpsit, developed by the court of chancery after it was authorized to issue writs similar in principle to the writs of trespass. At first this action did not partake of the nature of a contract action for it was only allowed when a man undertook to do something and then was negligent in doing it, and then the question of form or consideration did not arise. But, finally, it was allowed when a man promised to do something, and then failed altogether to do it, the detriment to the promisee being alone a sufficient ground for relief. Having taken this step, the courts found that they would have to take another, and class assumpsit as a contract action, but in doing so they adopted the old idea that a consideration was necessary for a contract, as the idea had grown up out of the action of debt and had been incorporated into the action of covenant. This necessity they found to be satisfied in the detriment to the promisee which, as the new remedy grew and expanded to embrace both unilateral and bilateral agreements, became either a detriment to the promisee in the unilateral, or a promise to do that which would be a detriment to the promisee in the bilateral. At last the modern consensual contract had taken complete possession of the field. For a time assumpsit kept in its own peculiar field, leaving the contracts under seal to covenant, and the contracts transferring property rights to debt, but the remedy of assumpsit is so simple and complete that it has gradually supplanted all other contract actions. Debt has disappeared and covenant survives only to a limited extent. With the disappear-

ance of debt, has disappeared also the necessity of a benefit to the party sued as a consideration for the contract. It is of importance now only in those suits in quasi contract which partake of the nature of debts, but even in quasi contracts the action is assumpsit. The old doctrine of quid pro quo survives in the doctrine that a consideration is necessary to the enforcibility of any agreement. The old formal contract perpetuates itself in the requirement of a seal or writing, or other formalities, in certain agreements. New requirements in regard to assent have grown up as necessary incidents to consensual contracts.

§ 50. Agreement, the meeting of the minds of two or more parties in one and the same intention, originates only in an offer on one side and an acceptance on the other.

ILLUSTRATIONS.

(1) D offers to sell a mare to B for $165. B thinks D says $65 and says he will take her at that price. Is this a true agreement? No. There is no meeting of the minds, on account of the mutual mistake. There is not even an apparent agreement.[127]

(2) A offers to sell B ten car loads of apples, at $2 per barrel, to be delivered on specified dates, at specified places, from stock inspected by B's agent, and to be loaded in refrigerator cars. B accepts this offer, on condition that the times of delivery will be changed. A accepts the modification and says "If satisfactory, answer and I will forward the contract." B replies, "All right, send contract." When the contract is received, B returns it, with other modifications, not referred to above. Does the above correspondence constitute a valid agreement? Yes. The minds of the parties have met on all of the terms, and the fact that they intend to sign another paper does not warrant the inference that they intend to make another and different agreement.[128]

(3) A offers to do certain metal work for $2,650 for B, who is bidding on the erection of a building. B secures the job and notifies A, telling him he is prepared to sign a written contract. A answers "All right"; but, when B calls the next day, A refuses to sign the contract. Is this a complete agreement? No. It is only a preliminary agreement. Not all the matters have been agreed upon. It is apparent that

[127] Rupley v. Daggett, 74 Ill. 351.

[128] Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75.

the parties intend to have the terms of the agreement reduced to writing and signed before the bargain is to be considered complete.[129]

(4) A offers, on the 24th of November, to sell 800 tons of iron to B for 69 s., and asks an answer by return. On the 27th, B asks for the price on 400 tons more. On the 28th A gives the same price on the four tons as he has given on the eight tons, and asks that the answer be sent by return post. On this same date, there crosses this letter a letter of B saying he will take 800 tons at 69, the letter expressing the hope that A will let him have 400 tons at 68 s. The course of post between the parties is one day. Is there a complete agreement concerning the 800 tons? No. The offer of the twenty-fourth expires by expiration of time on the twenty-fifth, and the two letters of the twenty-eighth are, therefore, two offers and not an offer and acceptance. Two offers will not make an agreement.[130]

§ 51. An offer is a proposal by one party to give or do something for another.

If the proposal is accepted, it then becomes a promise but it is not yet enforcible at law and, consequently, is not yet a contract. It is only when the law attaches binding force to the promise that it is invested with the character of a legal obligation. There are other essentials necessary to enforcibility, but the agreement is the first great essential and, before considering the other essentials, we shall study what is meant by offer and acceptance. Offers must be distinguished from invitations to others to make proposals, and expressions of willingness to consider offers. These are not offers, and an attempted acceptance of them does not create an agreement, for there can be no meeting of the minds in a common intention when one person still withholds his intention.

ILLUSTRATIONS.

(1) A sends out a circular announcing that a stock of goods is to be sold at a discount and asks tenders but does not promise to sell to the highest bidder. B tenders his bid and it is the highest, but it is not accepted. Is the circular an offer? No. It is not an offer but a proclamation that A is ready to chaffer for a sale. Had the circular said, "We undertake to sell to highest bidder," it would have amounted to an offer.[131]

[129] Donnelly v. Currie Hardware Co., 66 N. J. Law, 388, 49 Atl. 428.

[130] Tinn v. Hoffmann, 29 Law T. (N. S.) 271.

[131] Spencer v. Harding, L. R. 5 C. P. 561.

(2) The town of A advertises for bids on the construction of a bridge, requiring a certified check for $5,000 with each bid, an agreement for $5,000 liquidated damages and the execution of a contract within six days, by the person to whom the contract shall be awarded. B presents his bid and check and the commissioners of A vote to accept his bid but when asked to execute a contract they refuse. Is this an offer to make a contract? No. There is only an invitation to negotiate.[132]

(3) K writes M, "We are authorized to offer Michigan fine salt, etc., at 85c per barrel. At this price it is a bargain." M replies, "You may ship me 2,000 barrels Michigan fine salt, as offered in your letter." Is K's communication an offer which M is at liberty to accept? No. It is merely an advertisement, or business circular, to attract attention to bargains in salt and not intended as a proposal open to acceptance by another.[133]

§ 52. An offer may be made either by a promise or by an act, that is, by words or by conduct, or partly by one and partly by the other. If it is by words, it is called express; if by conduct, tacit or inferred.

A party may offer a promise for an act, or an act for a promise, or promise to make a promise, in either of which cases, if the offer is accepted, the agreement is called a unilateral agreement; but if he offers a promise for a promise, an acceptance makes a bilateral agreement. The offer made by conduct, and which is said to be inferred, is to be carefully distinguished from the quasi contractual obligations where it is sometimes said that an offer is implied. In the first case, there is true assent, as much as though the offer were express; but in the second case there is no assent.

ILLUSTRATIONS.

(1) P says, "I will give $5,000 to any person who will bring my wife's body out of that burning building, dead or alive." This is a promise for an act and the offer is express.[134]

(2) A undertakes and completes the building of a wall with the expectation that B will pay him therefor, and B knows that A is acting with such expectation. This is an offer of an act for a promise and is inferred.[135]

[132] Edgemoor Bridge Works v. County of Bristol, 170 Mass. 528, 49 N. E. 918.

[133] Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172.

[134] Reif v. Paige, 55 Wis. 496, 13 N. W. 473.

[135] Day v. Caton, 119 Mass. 513.

(3) A promises to pay B a certain sum of money at some future day for B's promise to perform certain services for A before that day. This is an offer of a promise for a promise.[136]

§ 53. An offer becomes such only when it is communicated to the addressee. If addressed to the public at large, the addressee is the person who first accepts it. To be communicated, the offer must at least be brought to the knowledge of the addressee.

Until communicated the offer might as well never have been made. A state of mind not communicated cannot be regarded in dealings between man and man. An agreement means assent, but a person cannot assent to that of which he has never heard.

ILLUSTRATIONS.

(1) On October 14th A offers a reward of $200 to any one who will give him information that will lead to the apprehension and conviction of the murderer of X. October 15th, one F is apprehended on information given by B, without notice of the offer of reward. After learning of the reward and with a view thereto, B furnishes information which leads to conviction of the party apprehended. Is there a complete agreement here? No. There is only one side of an agreement. An offer uncommunicated is the same thing as no offer.[137]

(2) On the 25th a railroad offers a reward of $5,000 for the arrest and conviction of the murderers of B. On the 24th, W gives information which assists in the arrest and conviction of the murderers. Has W accepted the offer of reward? No. First, he does not "arrest and convict" and, therefore, does not bring himself within the terms of the offer; second, there is no assent because he does not know of the offer.[138]

§ 54. An offer when once made continues every instant of time until it is revoked, lapses, or is accepted.

ILLUSTRATIONS.

(1) A, by mail, offers to sell B wool at a certain price, "Receiving your answer in course of post," but A misdirects his letter so that it is three days late. B accepts at once but, the day before receiving the acceptance, not having received an answer in what would have been the

[136] Funk v. Hough, 29 Ill. 145.
[137] Fitch v. Snedaker, 38 N. Y. 248.
[138] Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456. Contra, Williams v. Carwardine, 4 Barn. & Adol. 621.

usual course of post if the letter had not been misdirected, A sells the wool to another. Is this a valid acceptance? Yes. A makes the same identical offer, during all the time the letter is traveling, and the assent is completed by acceptance. The acceptance here is in course of post as the delay is the fault of A.[139]

(2) A verbally offers to buy B's shares, the offer to remain open three months. Within the three months B accepts, the offer not having been withdrawn. Is there a valid agreement? Yes. The offer continues until it is terminated in some way. There is no distinction between offers by mail and oral offers, as to duration.[140]

§ 55. An offer may be revoked at any time before acceptance (but never afterwards), even though the offerer proposes to keep the offer open a prescribed length of time, unless the offer is under seal, or supported by a valuable consideration.

The fact of naming a definite time in the proposal is for the proposer's benefit and simply operates as a warning that the offer will lapse at the time named anyway. An offer may be revoked at any time before it is accepted, and accepted at any time before it is revoked.

ILLUSTRATIONS.

(1) A bids $7,000 for certain property at a sheriff's sale but, learning that it is subject to a mortgage of $6,000, he retracts his bid before it is accepted, contrary to a rule of the sheriff announced before the sale. Is the offer withdrawn? Yes.[141]

(2) A guarantees to B the payment of all bills of exchange of C, discounted by B within twelve months, to the extent of 600 pounds. Later, A withdraws his guaranty before B acts on it. Is this guaranty revocable? Yes. It is revocable until accepted by being acted on as it is only an offer.[142]

(3) A, by letter on October 15th, applies for shares in the B company but, by letter received on the 27th at 8:30, he withdraws this application. The company votes him these shares on the 26th and addresses a letter of allotment to him early on the morning of the 27th. This is handed by a clerk of the company to the postman before the withdrawal is received, but the postman is not legally allowed to take

[139] Adams v. Lindsell, 1 Barn. & Ald. 681.

[140] Nyulasy v. Rowan, 17 Vict. Law R. 663.

[141] Fisher v. Seltzer, 23 Pa. 308.

[142] Offord v. Davies, 12 C. B. (N. S.) 748.

letters for posting and the letter does not reach the postoffice until after 8:30. Is the offer withdrawn? Yes.[143]

(4) On the 12th of September, W writes offering C $140 for a horse and saying "You can draw on us for $140." This is received on the 16th, on which day C signifies his acceptance by drawing on W for this amount; but, on the same day, W writes a letter withdrawing his offer, but this is not received until after the draft is sent. Is the offer accepted? Yes. Drawing according to the offer completes the assent and, when the offer is once accepted, the party making it cannot thereafter withdraw it.[144]

(5) A, an auctioneer, offers a tub for sale and B bids forty pounds, but, before A brings down his hammer, withdraws his bid. The next day the tub is sold to B for thirty pounds. Is B liable on his first bid? No. Mutual assent is necessary to a valid contract. B's bid is an offer, which is not binding until assented to, and may be withdrawn until accepted.[145]

§ 56. A revocation takes effect from the time it is communicated, which is when it is brought to the knowledge of the addressee. If the offer is a general one not made to any particular person, revocation takes effect when made in the same way that the offer is made. Notice of withdrawal must be as extensive as the notice of the offer.

ILLUSTRATIONS.

(1) D, on October 1st, offers to sell P tin plates at a certain price, subject to cable before the 15th. On the 11th, P telegraphs his acceptance. On October 8th, D sends a letter withdrawing his offer, but this is not received until the 20th. Is the offer withdrawn? No. A state of mind not communicated has no legal effect, and the letter of withdrawal is not communicated until it is received. Acceptance takes effect from the moment it is posted because the offerer impliedly makes the postoffice his agent, but the offeree does not make the postoffice his agent by sending his aceptance through that medium.[146]

(2) A buys a ticket of the B railroad and presents himself for passage, at the time advertised in the newspapers, but the train has been postponed two hours and the only notice thereof is some hand bills, which A has not seen. Is the offer to carry at the hour advertised withdrawn? No. The notice of withdrawal must be as extensive as the notice of the offer.[147]

[143] In re London & Northern Bank [1900] 1 Ch. 220.

[144] Wheat v. Cross, 31 Md. 99.

[145] Payne v. Cave, 3 Term R. 148.

[146] Byrne v. Van Tienhoven, 5 C. P. Div. 344.

[147] Sears v. Eastern R. Co., 96 Mass. (14 Allen) 433.

(3) A, in writing, agrees to sell B some property for 800 pounds and to leave his offer open until Friday at nine o'clock A. M. Thursday, B hears that A is attempting to sell or has sold, the same property to a third person, and then tenders an acceptance of the offer to him before nine A. M. Friday. Is the offer still open? Knowledge is equivalent to an express withdrawal, so that there can be no meeting of the minds thereafter.[148]

(4) The United States offers, in the newspapers, a reward of $25,000 for the apprehension of John H. Surratt and a large reward for information that shall conduce to his arrest. This offer is withdrawn through the same channel that it is made but, in ignorance of the withdrawal, A gives information that leads to the arrest of S. Is he entitled to the $25,000? No. First, he has not accepted that offer; second, the offer is withdrawn. An offer is revocable at any time before acceptance, and can be revoked in the same manner that it is made.[149]

§ 57. If the offerer has fixed a time within which the offer is to remain open it will lapse at the expiration of that time without any further act on his part.

ILLUSTRATIONS.

(1) A offers to sell B 266 hogsheads of tobacco at a certain price and promises to give B until four o'clock to consider his offer. Before four o'clock, B notifies A of his acceptance. Is this offer accepted? Yes. But if B had waited until after four o'clock the offer would have lapsed by expiration of the prescribed time.[150]

(2) A offers, on the 24th of November, to sell a certain quantity of iron to B for a certain price, and asks an answer by return mail. On the 28th, B writes a letter, saying he accepts A's offer. The course of post between the parties is one day. Is the offer accepted? No. The offer of the 24th expires, by expiration of time, on the 25th.[151]

§ 58. If no time is fixed, the offer will lapse at the expiration of a reasonable time.

What is a reasonable time is a question of fact for the jury, but the court will sometimes decide the point, where it is so plain that the court knows that a different verdict would be set aside. Questions of fact, by being often decided, in the course of time, become questions of law.

[148] Dickinson v. Dodds, 2 Ch. Div. 463 (only case on tacit revocation).

[149] Shuey v. U. S., 92 U. S. 73.

[150] Cooke v. Oxley, 3 Term R. 653 (Contra).

[151] Tinn v. Hoffmann, 29 Law T. (N. S.) 271.

ILLUSTRATIONS.

(1) Boston, by its mayor, because of frequent incendiary attempts, offers a reward of $1,000, by advertisement in 1837, for the apprehension and conviction of any person who shall set fire to buildings within the city. The advertisement runs about one week. In 1841, L, with the intent of gaining the reward, apprehends and secures the conviction of a person who sets fire to a building in the city. Does the offer still stand? No. It has lapsed by the expiration of a reasonable length of time.[152]

(2) On the 29th of February, by a letter to H, an inquiry, by A, is made for his selling price on ten to fifteen tons of band iron. March 2nd H gives prices. March 14th A writes H on other business without alluding to this matter. March 16th H answers and asks if A accepts the proposal on the band iron. This letter is received on the 18th, but H does not send a letter of answer until the 20th. The price is fluctuating. Is this a good acceptance? No. The offer has lapsed by the expiration of a reasonable length of time, as A has had the proposal in his possession since the 4th of March.[153]

§ 59. The death or known insanity of either party ipso facto causes an offer to lapse.

ILLUSTRATIONS.

(1) A offers to guarantee the payment by B of all goods sold him by C, but, before C sells B any goods, A dies. Is this offer terminated? Yes. One must ascertain whether a person on whose credit he is selling is alive.[154]

(2) A gives B authority to purchase goods for him from C. Subsequently A becomes insane but C does not know of this. Is B's authority terminated? Yes, as between A and B, but C must have knowledge of it before he is bound by the termination.[155]

§ 60. An offer lapses by rejection or a counter proposal, but not by a mere inquiry.

ILLUSTRATIONS.

(1) A offers to sell his farm for 1,000 pounds. B offers to buy for 950 pounds. A refuses this offer. Thereupon, B writes accepting the offer to sell for 1,000 pounds. Is this offer still open? No. It is terminated by the counter offer.[156]

[152] Loring v. City of Boston, 48 Mass. (7 Metc.) 409.

[153] Averill v. Hedge, 12 Conn. 424.

[154] Jordan v. Dobbins, 122 Mass. 168.

[155] Drew v. Nunn, 4 Q. B. Div. 661; Beach v. First M. E. Church, 96 Ill. 177.

[156] Hyde v. Wrench, 3 Beav. 334.

(2) M, by letter, offers to sell S wire for 40 s. net, offer to remain open until Monday. Monday morning, S wires, "Will you accept 40 s. for delivery over two months?" Just as this message is received, M sells to another and telegraphs that fact to S, but before its arrival S sends a telegram of acceptance of the original offer. Is this offer still standing? Yes. The inquiry of Monday is not a rejection and, therefore, the offer continues until the time for accepting or rejecting has expired.[157]

(3) A mill company offers to sell a railroad company some 2,000 to 5,000 tons of iron rails, if notified by December 20th, and the railroad company replies December 1st, that it will take 1,200 tons at that rate. The mill company declines this and then the railroad company telegraphs that it will take 3,000 tons. Is this a good acceptance? No. An acceptance varying the terms of the offer is a rejection of the offer and puts an end to the negotiations, unless in turn accepted.[158]

§ 61. An acceptance is an absolute and unconditional accession to the identical terms of the proposal.

The meeting of the minds required by an offer and acceptance is an expressed, and not a secret meeting. A man must stand by terms which he has actually expressed. A common intention means that both parties must have an intention and that the same one; therefore, there can be no contract if the offer is unknown or if there is no accession to the offer. The absolute identity of offer and acceptance is necessary because, otherwise, the intention expressed by one party would either be doubtful or different from that expressed by the other.

ILLUSTRATIONS.

(1) A offers to supply B with any quantity of iron he may order during a certain period at specified prices. B accepts the tender. Several orders are given by B and supplied. Then A refuses to supply any more. Is the offer accepted? So long as the tender stands, every order amounts to an acceptance, but the mere acceptance of the tender amounts to nothing, because of the lack of mutuality.[159]

(2) A commission firm advertises that it will pay ten and one-half cents for eggs, shipped to arrive by February 22nd, acceptance, stating

[157] Stevenson v. McLean, 5 Q. B. Div. 346.

[158] Minneapolis & St. L. Ry. v. Columbus Rolling Mill, 119 U. S. 149.

[159] Great Northern R. Co. v. Witham, L. R. 9 C. P. 16.

the number of the cases, to be sent by February 20th. A rival firm, on February 20th, accepts this offer for 450 cases, but adds the condition that the offerer can pay a certain price for the cases themselves, or return them. The eggs are pushed on cars from one house to the other before the 22nd. Is this offer accepted and is it a perfect agreement? No. Acceptance differs from the offer.[160]

(3) B offers, in a newspaper, to pay $5,000 for the delivery to the sheriff, with evidence to convict, the person who administered poison to X. O arrests Y, but the latter is discharged on a committing trial. The offer is then withdrawn, but B tells A to go on and he will pay him what his services are worth. Is he entitled to the $5,000? No. That offer is withdrawn. He must sue in quantum meruit.[161]

(4) A offers a reward of $25,000 for the arrest and conviction of the party breaking into a school house. Through fear of arrest, and without expectation of receiving the reward, but with notice of it, B gives the information for which the reward is offered. Is this an acceptance? No. It must be given with a view to obtaining the reward, or there is no assent.[162]

§ 62. An acceptance may be made by a promise or by an act, according to which is asked for by the offer.

ILLUSTRATIONS.

(1) A asks B to assist C to get some money, and offers to see that it is paid. B signs a note with C, as surety, and seasonably sends notice of it to A by mail (though this is never received). B has to pay the note. Can he compel payment by A? Yes. This is an offer of a guaranty which can be accepted by an act and only seasonable notice of acceptance need be given. The offer is by mail and, therefore, contemplates an answer by mail.[163]

§ 63. The acceptance must be communicated.

There can no more be an acceptance of an offer, without notifying the offerer of the intent to accept, than there can be an offer uncommunicated.

ILLUSTRATIONS.

(1) An insurance company which has been carrying fire insurance for P writes him that it will reinsure his property for another year

[160] Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612.

[161] Biggers v. Owen, 79 Ga. 658, 5 S. E. 193.

[162] Vitty v. Eley, 51 App. Div. 44, 64 N. Y. Supp. 397; Hewitt v. Anderson, 56 Cal. 476. Contra, Williams v. Carwardine, 4 Barn. & Adol. 621.

[163] Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665.

unless notified to the contrary. Relying on this promise, P gives the company no notice to insure or not to insure. Is the offer accepted? No. Some communication of acceptance is necessary. If P does not want insurance, the company could not impose a liability in this way, so he cannot hold the company. Both parties must be bound or neither is bound.[164]

(2) A writes B, "Upon an agreement to furnish my offices within two weeks, you can begin work at once." B makes no reply to this note, but commences work at once. Is this an acceptance? No. The terms of the offer indicate that this is an offer of a promise for a promise and such an offer cannot be accepted without making the acceptance known to the other party. A proposition alone cannot make an agreement. Where a bilateral agreement is offered it cannot by acceptance be turned into a unilateral agreement. But even if a unilateral agreement had been offered, acceptance would not be complete until the work should be finished, so that B's case would be hopeless on either ground.[165]

(3) B asks R to bind, for a few days, certain insurance policies about to expire, but R says nothing in answer. B thinks R has assented. R does not bind the policies. Is this a complete agreement? No. Silence, when it is not a man's duty to speak, is no evidence of an acceptance. If anything, it is evidence of nonacceptance.[166]

§ 64. If the acceptance consists of a promise it may be communicated by being put in process of transmission to the offerer; if it consists of an act, the performance of the proposed act is in itself sufficient, if it appears from the offer that other communication is dispensed with; but silent consent, or performance of an act in ignorance of an offer, never amounts to an acceptance.

ILLUSTRATIONS.

(1) A, by letter, offers to insure B's house to the amount of $8,000 for a premium of $56, and says "should you desire to perfect the insurance, send me your check." The day after receiving the offer, B replies enclosing his check for the amount of the premium. Is this a sufficient acceptance? Yes. When one makes an offer by mail he impliedly makes the mail service his agent to bring back the acceptance to him. This is really a unilateral agreement because the acceptance asked for is an act—sending the check, and not a promise.[167]

[164] Prescott v. Jones, 69 N. H. 305, 41 Atl. 352.

[165] White v. Corlies, 46 N. Y. 467.

[166] Royal Ins. Co. v. Beatty, 119 Pa. 6, 12 Atl. 607.

[167] Tayloe v. Merchants' Fire Ins. Co., 50 U. S. (9 How.) 390.

(2) A offers to give $5,000 to any one who will bring his wife's body, dead or alive, out of a burning building. B, having received notice of this offer, and relying on it, brings the body of A's wife out of the building. Is this an acceptance? Yes. This is a promise for an act and the only thing necessary to consummate the acceptance is the performance of the act.[168]

(3) A undertakes and completes the building of a wall, with the expectation that B will pay him for his work, and B knows that A is so acting, and allows him to work without objection. Is there an acceptance of A's offer? Yes. This is an offer of an act for a promise. The promise is inferred as a matter of fact from B's conduct and his conduct is a sufficient transmission thereof.[169]

(4) A has shoes in B's possession and writes B that he can have them for a given price cash, but if he cannot pay cash by return mail to return the shoes. B does nothing for a few days, and then returns the shoes. Is the offer accepted? Yes. The neglect of duty to return imposes an acceptance of the alternative offer.[170]

§ 65. If the offer designates a time, place or means of acceptance, the acceptance must be in accordance therewith or it amounts to nothing.

ILLUSTRATIONS.

(1) A offers by mail on the 8th to lease a building to B, but makes his offer dependent upon the receipt of a telegram of acceptance by him before the 20th. B telegraphs acceptance on the 17th, but the telegram is never delivered. Is this an acceptance? No. The offerer has made the actual receipt of the acceptance by him necessary to complete the assent. Had he simply said, "Telegraph answer," there would have been a good contract.[171]

(2) E offers to buy 300 barrels of flour from H, at $9.50, sending his offer by H's wagoner from Harpers Ferry and requesting an answer by return of the wagon, which indicates the time and place of acceptance but not necessarily the means. H accepts by letter addressed to Georgetown, and received a week later than "by return wagon." Is this a complete acceptance? No. Acceptance at a time or place different from that pointed out does not complete the agreement.[172]

[168] Reif v. Paige, 55 Wis. 496, 13 N. W. 473.

[169] Day v. Caton, 119 Mass. 513.

[170] Wheeler v. Klaholt, 178 Mass. 141, 59 N. E. 756.

[171] Lewis v. Browning, 130 Mass. 173.

[172] Eliason v. Henshaw, 17 U. S. (4 Wheat.) 225.

§ 66. The acceptance takes effect from the moment it is properly dispatched out of the sender's control, that is, when delivered to the agent, express or implied, of the offerer, unless the offerer makes acceptance depend upon his actual receipt of it.

When the addressee accepts, in the manner expressly or impliedly authorized by the offerer, it is the same thing as though he had put his acceptance into the hands of the agent of the offerer. Accordingly, if the postoffice is authorized by the offerer, the aceptance takes effect when it is posted. Sending an offer, under circumstances indicating that it must be within the contemplation of the parties that, according to the ordinary usages of mankind, a certain means may be used in communicating the acceptance, makes that means the agent of the offerer.

ILLUSTRATIONS.

(1) G hands to H's agent an application for 100 shares of stock. This is allowed by H, and a letter of allotment is posted to G, but this G never receives. It is found that G authorizes H to notify him by mail. Is there a sufficient acceptance? Yes. The minds of the parties meet on the posting of the acceptance.[173]

(2) On the 24th of December, F offers by letter to sell brandy to M. On the 17th of January, M answers that he will decide to take it in case of war. By letters of the 7th and 28 of March, F shows that he intends to keep the offer of the 24th of December open, though these letters are not received until after M's death. March 31st, M writes and mails an unconditional acceptance. M dies on the 10th of April, before F receives the letter of acceptance of the 31st. Is the offer accepted before revoked by death? Yes. The letter of the 31st completes the agreement. The offer continues up to the time of revocation, and acceptance dates from the moment of despatch, not from the moment of knowledge. The case is decided according to the rules governing bilateral agreements, but the fact that M has the brandy in his possession makes it difficult to conceive of it from this standpoint.[174]

(3) A, by handing him his offer, offers in writing to give B the refusal of certain property for fourteen days, at 1,750 pounds. The following day A sells the property to another and mails notice to B that he withdraws his offer. Before receiving the withdrawal, B accepts the

[173] Household Fire & Carriage Acc. Ins. Co. v. Grant, 4 Exch. Div. 216.

[174] Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103.

offer by mail, and not orally as he lives at a town some distance away and takes the offer home with him. Does this acceptance take effect from the time it is posted? Yes. It is within the contemplation of the parties that the acceptance shall be posted.[175]

§ 67. An acceptance once unconditionally made cannot be revoked.

The agreement is concluded and it is now too late for further dickering. Other communications that may reach the offerer before acceptance will be of no avail, and it makes no difference if the acceptance never arrives at all.

ILLUSTRATIONS.

(1) On the first of January A, by mail, proposes to B to sell him 1,000 bushels of wheat at a certain price. On the third of January B mails a letter accepting this offer, and this acceptance is received by A the morning of the fourth. Immediately after despatching his letter of acceptance, B sends a telegram rejecting the offer, and this is received by A on the evening of the third. Is this acceptance revoked? No.[176]

§ 68. The effect of an acceptance is to complete the agreement, which dates from the moment of acceptance and not from that of the offer, and, henceforth an offer can neither be revoked nor lapse in any way. Revocation of an offer, after acceptance, is too late.

While the offerer impliedly authorizes the use of the same means by the addressee as the offerer uses in making his offer, the addressee does not authorize the offerer to use any means in revoking his offer. In the case of communication of offer and acceptance by means of telegraph, each party also makes the telegraph company his agent for the transmission of his own message, but it is only to the extent of sending the message as written and if it is altered by the company in transmission the sender is not bound thereby.

[175] Henthorn v. Fraser [1892] 2 Ch. 27.

[176] Mactier's Adm'rs v. Frith, 6 Wend. (N. Y.) 103.

ILLUSTRATIONS.

(1) A offers to give $9.50 per ton for hay, and B answers, "You can take the hay at your offer, but after you have hauled it if the hay proves good enough so that you can pay $10 per ton, I should like to have it." The hay burns and A denies liability. Is this a complete agreement? Yes. There is an absolute acceptance of the offer and, thereafter, the offer cannot be withdrawn. The clause in regard to the payment of $10 may be disregarded.[177]

(2) A receives from B, on the 30th of December, an offer to sell pig iron when the usual course of trade demands an answer by the next mail. This is on the 30th. A answers on the 30th but misdates his letter the 31st, and by fault of the mail service the letter is delayed one day. Is this acceptance binding? Yes. The acceptance takes effect from the time posted and it is the offerer's loss thereafter. The mistake in date is open to explanation.[178]

(3) On the 1st, by letter, A makes an offer to do something for B. On the 4th B mails an acceptance of this offer. On the 3rd A mails a letter withdrawing his proposal but B does not receive this until after he has mailed his acceptance. Is the offer withdrawn? No.[179]

§ 69. In order that the agreement may be enforcible the minds of the parties must not only meet in a common intention but that intention must be definite and certain or capable of being made so.

ILLUSTRATIONS.

(1) A agrees to pay B, if he does certain work, such remuneration as shall be deemed right. B does the work. Is this an enforcible agreement? No. A has the option to pay or not to pay as he thinks right, which is too indefinite.[180]

(2) A promises to sell B the middle one-third of a certain quarter section of land for a specified price and B accepts this offer by agreeing to pay the price. Is this agreement enforcible? No. There is no way of determining what one-third of the quarter section is meant by the agreement.[181]

(3) W offers to furnish three steamers belonging to A, with pea coal for the year 1888, for $3.05 a ton. A replies, "I accept your offer." Though this agreement is indefinite at the time, it is determinable by its terms, and that is definite which can be made definite. Here, also,

[177] Phillips v. Moor, 71 Me. 78.

[178] Dunlop v. Higgins, 1 H. L. Cas. 381.

[179] Wheat v. Cross, 31 Md. 99.

[180] Taylor v. Brewer, 1 Maule & S. 290.

[181] Sherman v. Kitsmiller, 17 Serg. & R. (Pa.) 45.

is a sufficient consideration for the agreement because there is a mutuality of promises, it being necessarily inferred that A promises to buy of W the coal needed for his steamers.[182]

(4) A father loans to his son money, taking the son's promissory note. The son complains that he has not had an equal share with the other children and the father says: "If you will stop complaining, I will not sue you on the note" and the son promises to leave off complaining. Is there a consideration for the father's promise? The answer to this question depends upon whether the promise is given for the son's promise to stop annoying his father generally by complaining, or to stop annoying his father by complaints in regard to not getting an equal share, for in the latter case, as the son has no legal right to complain he can show no consideration for his promise. But outside the question of consideration, the promise of the son is so indefinite and uncertain as to be incapable of enforcement.[183]

§ 70. In order to be enforcible the agreement must be intended to create legal relations.

ILLUSTRATIONS.

(1) A young man and a young woman go through a marriage ceremony, all with the understanding that it is in jest. Is this agreement enforcible? No. Because it is not made with an intention to create legal obligations. Offers made in jest do not form the basis for a valid contract. Another illustration of this rule is that of a mutual mistake as to the existence of the subject-matter of a contract.[184]

[182] Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142.

[183] White v. Bluett, 23 Law J. Exch. 36.

[184] McClurg v. Terry, 21 N. J. Eq. (6 C. E. Green) 225.

CHAPTER IV.

REALITY OF AGREEMENT.

I. Mistake, § § 72-77
   A. As to nature of transaction, § 73
   B. As to identity of party, § 74
   C. As to identity of subject, § 75
   D. As to intention of other party known by him, § 76
   E. Effect, § 77
II. Misrepresentation, § § 78-81
   A. Equitable relief, § 79
   B. Agreements uberrimae fidei, § 80
      1. Because of subject-matter, § 80
      2. Because of relationship, § 80
      3. Because trust and confidence are reposed, § 80
   C. Effect, § 81
III. Fraud, § § 82-90
   A. Representation, § 83
   B. Falsity, § 84
   C. Material facts, § 85
   D. Knowledge of falsity, § 86
   E. Intention, § 87.
   F. Deception, § 88
   G. Injury, § 89
   H. Effect, § 90
IV. Duress, § § 91-94
   A. Of imprisonment, § 91
   B. Per minas, § 92
   C. Of goods, § 93
   D. Effect, § 94
V. Undue influence, § § 95-99
   A. With confidential relationship, § 96
   B. Without confidential relationship, § 97
   C. Presumptions, § 98
   D. Effect, § 99

§ 71. Though the minds of the parties apparently meet in a common intention, if this is accomplished under such circumstances as to make it no real expression of intention, the agreement lacks one of the elements necessary to enforcibility.

The first great essential of enforcibility in modern law is an agreement in fact as well as in form. If this does not

exist, the first and greatest element of a contract is lacking, and there is nothing upon which to build more than a voidable contract. The circumstances which affect the reality of assent are ignorance and lack of freedom of action. Ignorance that affects assent, if not caused by the act of the other party, is referable to mistake; but, if caused by the act of the other party, to misrepresentation or fraud. The lack of freedom of action that vitiates assent, if caused by the act of the other party, is called duress; if due to the relationship which he sustains, undue influence.

§ 72. **If the offer and acceptance meet in a common intention, so as to form an agreement, such agreement is not vitiated by a mistake of one or both of the parties; but there are a few special cases where, on the face of the transaction, an agreement has been concluded, but where there is no real agreement because the parties, through a mistake, do not arrive at a common intention, and such agreements are vitiated by the mistake.**

The law will not permit one who has entered into an agreement to avoid its operation on the ground that he does not attend to the terms used by himself or the other party, or that he is misinformed as to its contents, or is mistaken as to its legal effect; yet, where there are circumstances of mistake, or mistake and fraud, an apparent agreement may be avoided. The doctrine, however, does not include cases where because of mistake the offer and acceptance never agree in terms, for then there is not even an apparent agreement. This question has already been considered under the head of offer and acceptance. The doctrine does not include cases of real agreement, but failure to express it. There the parties may have the agreement, as expressed, corrected to conform to their real intention. This subject will be alluded to again under the head of remedies. The doctrine does not include cases where the agreement is procured by misrepresentation. In such cases the agreement may be affected, not by mistake, but by another circumstance which will be presently considered. The doctrine does not include cases of mistake as to the existence of the

subject-matter of the agreement, or as to the party's power to perform it, for each of them relates to the performance of contracts and will be treated under the topics "Failure of Consideration" and "Conditions."

§ 73. The execution of one instrument when a person intends to execute a different kind of an instrument, if caused by the act of a third party or the fraud of the other party, renders the agreement void, but the person accepting may be estopped by his negligence from showing his mistake.

There is no real common intention, but only the appearance of one, in a case of this sort. This is a mistake as to the nature of the transaction. If it is in writing, the acceptor never really signs the agreement to which his name is appended. It is just as though he had written his name on a sheet of paper in idle pastime or to practice his signature.

ILLUSTRATIONS.

(1) M signs a bill of exchange as an indorser. The paper is presented to him for his signature by C, who informs him that it is a guaranty. Admitting that M is not negligent, is this a valid agreement? No. This is such a mistake as to prevent any meeting of the minds in a common intention.[185]

(2) A man, C, unable to read the English language, signs a promissory note, when he is told and believes he is signing a contract making him an agent to sell a patent right. This note is sold to B, a third party. Is C liable? No. This agreement is void, and being void there is nothing for the third party to be a bona fide holder of.[186]

§ 74. An acceptance by one man of an offer, which is plainly meant for another, or which is made to him because of his falsely representing himself to be another, renders the agreement void.

To come within this rule, the offerer must have in mind some definite person with whom he intends to contract. Under the circumstances of the proposition, there is no

[185] Foster v. Mackinnon, L. R. 4 C. P. 704.

[186] Walker v. Ebert, 29 Wis. 194; Alexander v. Brogley, 63 N. J. Law, 307, 43 Atl. 888.

more real assent than though the offer were never accepted. This is a mistake as to the indentity of the party with whom the agreement is made. In the first supposition a party takes advantage of a mistake; and in the second, he creates it.

ILLUSTRATIONS.

(1) P sends an order for ice to the C ice company. This company has sold out its business to the B ice company which delivers ice to P who believes that C is delivering the ice, and takes it in that belief. Is there an agreement? No. A person cannot enter into an agreement with a person whom he does not know to be a party to the agreement. As to whether there is any quasi contractual obligation, see chapter on quasi contracts.[187]

(2) In a communication by mail, one Blenkarn, by his artifices, makes L think he is Blenkiron, and gets an offer on handkerchiefs from L, and accepts it by ordering the goods. Is this an agreement? No. If there is any agreement, it is between L and Blenkiron, but there can be none between them because Blenkiron knows nothing of the agreement.[188]

§ 75. When two things have the same name, an offer referring solely to one of the two things and an acceptance referring solely to the other, renders the agreement void.

Under such circumstances there is only the shadow of a common intention for, because of the mistake as to the identity of the subject, the minds of the parties never really agree.

ILLUSTRATIONS.

(1) A agrees to sell to B, and B to buy, cotton to arrive from Bombay by a ship called "Peerless." It seems there are two ships by this name, and B has in mind one to sail in October, while A has in mind one to sail in December. Is this offer accepted? No. There is no real meeting of the minds.[189]

(2) A offers to sell to B four lots of land in Waltham on Prospect Street for a certain price, and B accepts the offer but thinks the offer

[187] Boston Ice Co. v. Potter, 123 Mass. 28.

[188] Cundy v. Lindsay, 3 App. Cas. 459.

[189] Raffles v. Wichelhaus, 2 Hurl. & C. 906.

refers to lots on another Prospect Street in Waltham. Is this agreement void for mistake? Yes. While apparently the parties assent to the same thing, really, one is negotiating for one thing and the other is selling a different thing.[190]

§ 76. If one party accepts an offer thinking that the offer refers to a certain thing and that such thing is what is offered, and the other party knows this, but intends to offer a different thing, the agreement is void.

The vitiating circumstance here is the fact that the offerer knowns that the other party thinks he is offering the certain thing and allows the mistake to continue. One person is not bound to enlighten another with whom he is dealing or prevent him from deceiving himself, but he must do nothing to deceive him. The fraud, coupled with the mistake, renders the agreement not merely voidable but void.

ILLUSTRATIONS.

(1) A offers to buy of the X railroad a ticket for $21.25, when the fare should be $36.75. A knows this is a mistake but X does not, and A knows that X does not. Is this agreement void? Yes. Because of the mistake on one side and the fraud on the other.[191]

§ 77. The effect of mistakes such as those above enumerated, being to make the apparent agreement void, neither the parties thereto nor innocent third parties can acquire any rights thereunder.

The apparent agreement being void, there is no contract and, consequently, there is nothing for even an innocent third party to base any rights upon, and this is so though the pretended agreement is in the form of a promissory note. The inquiry goes back of the question of negotiability; it challenges the origin and existence of the agreement or proposition itself. Until a thing has an existence it is absurd to talk about negotiating it.

[190] Kyle v. Kavanaugh, 103 Mass. 356.

[191] Shelton v. Ellis, 70 Ga. 297.

§ 78. As a general rule a nondisclosure or even an innocent misstatement, not a term of the contract, is immaterial.

Representations are of three kinds: Those made innocently, those made fraudulently and those made terms of the contract itself, which are either conditions or warranties. Innocent misrepresentation differs from fraud in that it lacks the element of fraudulent intent and the test is, does the representation give rise to an action ex delicto? A representation made to induce a contract differs from a condition and a warranty in that the latter are promises, the condition being the basis of the contract and the warranty being a subsidiary undertaking. The subject of fraud will be treated next in order, and conditions and warranties will receive treatment under the head of performance. It is the policy of the law to overlook any representations which do not amount to fraud or which are not made terms of the agreement. If men could go into all the discussions and statements made by way of inducement to contract, there would be no end to trials. A certain latitude must be allowed a man who wants to gain a purchaser. Caveat emptor is the rule. Accordingly, in order to bring an innocent misrepresentation into the light of the condemnation of the law, it is necessary to show, between the parties, either some relation of super-abounding confidence, or that, for other reasons, they are not dealing on terms of equality. The particular consideration of the various elements of misrepresentation will be postponed until considered in fraud, as fraud is misrepresentation with the element of knowledge added.

ILLUSTRATIONS.

(1) A, by charter party, agrees with B that his ship, then in the port of Amsterdam, shall proceed to Newport and load coal. At the time, the ship is not in the port of Amsterdam and she does not arrive for four days. Does this fact give B the right to repudiate his contract? If a representation, no; if a condition, yes, as the representation is not fraudulent.[192]

[192] Behn v. Burness, 3 Best & S. 751; Davison v. Von Lingen, 113 U. S. 40.

(2) A offers to sell to B for $3,000 certain land owned by him, honestly representing that the description in his deed corresponds with certain physical boundaries, which would include a fine residence site. This representation is false. B is living on the land at the time, accepts the offer and pays the purchase price. Is this contract voidable for misrepresentation? No. There is nothing but an innocent misstatement, under circumstances where the parties are dealing on an equality, and caveat emptor applies.[193]

§ 79. Equity will not enforce specific performance of a contract for one who by innocent misrepresentation induces another to contract.

§ 80. Contracts are uberrimae fidei either because of the nature of their subject-matter or because of the relations of the parties or because trust and confidence are especially reposed by one in another; but in either case a misrepresentation either by affirmation or concealment will be sufficient ground for avoidance of the contract.

Contracts uberrimae fidei because of the nature of the subject-matter are such as contracts of insurance, of suretyship and of guaranty. Those uberrimae fidei, because trust and confidence are especially reposed, are most frequently contracts for the purchase of land or stock or chattels. Those uberrimae fidei because of the relations of the parties are such as those between parent and child, guardian and ward, trustee and beneficiary, principal and agent, attorney and client, physician and patient and spiritual advisers and those advised.

ILLUSTRATIONS.

(1) An applicant for insurance is asked to state whether there are any buildings within ten rods of the one to be insured, and he answers that there are five. As a matter of fact there are not only five but also several others. The insurance company issues the policy on the application. Is the contract voidable because of the misrepresentation? Yes. Intentional fraud is not necessary in order to vitiate this contract, as it is one uberrimae fidei because of the nature of the subject-matter.[194]

[193] Brooks v. Hamilton, 15 Minn. 26 (Gil. 10).

[194] Burritt v. Saratoga County Mut. Fire Ins. Co., 5 Hill (N. Y.) 188.

(2) A seller of a piece of land states that it includes about five acres more than the description includes, but in making the statement he is merely misled by the survey and is innocent of intentional wrong. Reasonably relying on this statement, the buyer takes the land and gives his notes for the purchase price. In a suit on the note, is the defendant entitled to a recoupment because of this misrepresentation? Yes. This is a contract uberrimae fidei because of trust and confidence reposed.[195]

(3) W takes out insurance with L, the reason for his doing so being his fear that his house will be burned, which fear is aroused by an attempt to set another building on fire, but he does not disclose this fact to L. Can L avoid the policy? Yes. This is a case where every fact affecting the risk must be disclosed.[196]

(4) R makes application for insurance to P insurance company. In the blank application are the questions: 1 "Has any application for insurance been made to other companies"? 2 "If so, with what result"? 3 "What amounts are now insured and with what companies"? He answers, "$10,000 Equitable." He has applied for insurance in two other companies, but has been declined. P accepts the application. Is the contract voidable? No. If the answer is imperfect on its face, the company will be held to have waived the imperfection, but where it purports to be a complete answer a misstatement or omission will avoid the policy. This answer is patently incomplete as it is responsive to the third interrogatory.[197]

(5) One year after becoming of age, A sells some land to her former guardian. She is told by her guardian that there is $700 of indebtedness against the land and that it is liable to be sold therefor, and he offers to pay her $600, and to pay off this claim, and because of her reliance upon this statement she conveys the land. There is only about the sum of forty dollars due upon the land. Is this deed voidable for misrepresentation? Yes. The relationship between the parties is still such that a misrepresentation will render voidable a contract induced thereby; but in order to avoid the deed, A will have to return what she has received.[198]

(6) One N is a tenant in common with S in certain coal lands, but holds the legal title and is, therefore, a trustee for S. After S's death, N procures a conveyance of her interest from S's wife without informing her that there are coal mines being worked on the land, and that the same is becoming valuable, and that she has a clear right to the property and its great value. She is eighty-six years old and her mind is somewhat impaired. Is the conveyance voidable for misrepresentation? Yes. The relationship of trustee and beneficiary demands a disclosure

[195] Mulvey v. King, 39 Ohio St. 491.

[196] Walden v. Louisiana Ins. Co., 12 La. 134.

[197] Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183.

[198] Wickiser v. Cook, 85 Ill. 68.

of any fact affecting the subject of the contract. The burden of proof is on the trustee to show fairness and equity, and this he has failed to do.[199]

(7) A vendee in New York goes to New Orleans to purchase some tobacco knowing that a treaty of peace, just signed by the United States and Europe, will greatly enhance the price of tobacco, but he does not disclose this fact in any way. Is this contract voidable for non-disclosure? No. As there is no confidential relationship between the parties, the buyer is not bound to disclose extrinsic facts, affecting the value of the commodity.[200]

(8) A purchases land of B, knowing at the time that there is a valuable mine on the land, but without disclosing this fact. Is the contract voidable? No. Nondisclosure of an extrinsic fact by the purchaser will not affect even a contract in regard to the sale of land. A vendee is not under the same obligations as the vendor in the matter of making disclosures.[201]

§ 81. When it has any effect on a contract, an innocent misrepresentation makes it voidable.

As the effect on a contract of an innocent misrepresentation, when it has any, is to make the contract voidable, the injured party may disaffirm the contract except as against innocent third parties, within a reasonable time after discovering the falsity of the representation, by returning what he has received, or he may ratify it by positive acts or acquiescence for an unreasonable length of time. If a contract is voidable for innocent misrepresentation, the after consequences are the same as in the case of a contract voidable for fraud.

ILLUSTRATIONS.

(1) W accepts from I a deed to lots, in settlement of a debt, on I's representations that the lots are of particular situations and values. The lots are not worth one-fifth of the value they are represented to be, though I does not knowingly deceive W. On what conditions can W disaffirm? Upon acting without unreasonable delay and reconveying the lots.[202]

[199] Spencer & Newbold's Appeal, 80 Pa. 317.

[200] Laidlaw v. Organ, 15 U. S. (2 Wheat.) 178.

[201] Harris v. Tyson, 24 Pa. 347.

[202] Wilcox v. Iowa Wesleyan University, 32 Iowa, 367.

§ 82. A false statement or an active concealment of a material fact made with knowledge of its falsity to induce another to enter into a contract, if the other reasonably relies and acts upon it to his injury, renders the contract voidable by the one defrauded.

At the early common law, the rule was quite absolute that in order to have any effect on a contract a misrepresentation had to be made with knowledge of its falsity, unless a term of the contract. Equity, however, established a more liberal doctrine generally refusing specific performance or granting affirmative relief when there was a material misrepresentation, though made without knowledge of its falsity. But, in the changes of the law through the centuries, the common law doctrine and the equitable doctrine have gradually approached each other until at last they have practically merged into an indistinguishable whole. The doctrine of knowledge has been extended by the rules of the scienter so as to include misrepresentations made recklessly, misrepresentations in regard to something peculiarly within one's own knowledge and active concealment; and the contracts uberrimae fidei have been extended so as to include cases where trust and confidence are expressly reposed until every case of voidability for misrepresentation is included under one as much as the other. Hence, in classifying the statements which will render a contract voidable, it is immaterial whether they be called misrepresentations or frauds. If they are all classed as misrepresentations they will include those made uberrimae fidei and those not; if classed as frauds, they will be divided into actual and constructive. It is no longer necessary nor perhaps expedient to distinguish between innocent misrepresentation and fraud so far as the law of contracts is concerned. If the false statement is sufficient to avoid the contract, it makes no difference whether it is called innocent misrepresentation or fraud. But, from the viewpoint of torts, it is still necessary to preserve the essential of making a false statement knowingly. Fraud is a misrepresentation made with knowledge of its falsity and an active attempt to deceive. Nondisclosure may amount to misrepresentation and be a ground

for the avoidance of a contract involving super-abounding confidence, but it will not constitute anything more than constructive fraud, unless it is industrious.

§ 83. In order to amount to a representation, the statement or nondisclosure must relate to a past event or an existing fact, or must be an affirmation of a matter in the future as a fact.

Statements of opinion, expectations, predictions, motives, or of law, do not amount to representations in this sense, but a representation may be made by artful devices and contrivances whereby defects are concealed, just as well as by positive misstatements.

ILLUSTRATIONS.

(1) A is negotiating for the purchase of land from B and they go upon the land to look it over. While there B expresses the opinion that the land will produce a certain quantity of hay and that there is a certain quantity of wood upon it, and that he thinks there are a certain number of acres in the tract, and that some buildings on an adjoining lot can be bought cheaply. Do these statements amount to representations in the legal sense? No. They are mere expressions of opinions and not positive assertions, and, in addition to this, A has equal opportunity with B to ascertain the facts.[203]

(2) Certain creditors who are about to bring a creditors' bill against other parties apply to a sheriff to know whether a certain writ has been returned in due form of law and the sheriff informs them that it has been returned in due form of law when, as a matter of fact, it is not according to the requirements of law. Is this a misrepresentation? No. It is a statement in regard to a point of law, an affirmation concerning an instrument, completely within the reach of the questioners.[204]

(3) A, in offering a horse for sale to B, by artful devices, hitches the animal in such a way as not to disclose that it is a cribber, and, when asked why he so hitches it, gives an evasive answer. B, relying upon the soundness of the horse, buys the animal. Is the contract voidable for fraud? Yes. This is an active concealment which is equivalent to a false statement. Artful devices by which one conceals a material fact and prevents the other from discovering it constitute fraud.[205]

[203] Mooney v. Miller, 102 Mass. 217.
[204] Starr v. Bennett, 5 Hill (N. Y.) 303.
[205] Croyle v. Moses, 90 Pa. 250.

§ 84. A representation is false if it creates an impression that is false.

Half the truth may be a lie.

§ 85. A representation is in regard to a material fact if it tends to induce the party, to whom it is made, to enter into the contract.

ILLUSTRATIONS.

(1) A states that he has purchased a quantity of rails at a certain price, and that he will sell them to B at the same price, if B will make a contract with C to build a certain railway. B makes said contract with C. A has not purchased the rails and B is obliged to buy them at a higher price from other parties. Is this a statement in regard to a material fact? No. It is only a statement in regard to a collateral matter, and does not constitute an essential element of the contract. It is not even a representation, but a promissory statement in regard to something in the future, and if there is any action it is for breach of contract.[206]

§ 86. A person is considered to know of the falsity of a representation, if he knows it is false, or makes it of his own knowledge, not knowing whether it is true or false, or if it is regarding something peculiarly within his own knowledge.

These are called the rules of the scienter and from the standpoint of torts it is important to know them for a person can only be held liable for deceit when he has knowledge of the falsity of his statement; but, from the standpoint of contracts, it is immaterial whether these statements are said to be made with knowledge or simply are called misrepresentations under these particular circumstances.

ILLUSTRATIONS.

(1) In a sale of land by A to B, A represents to B that the land is good prairie land, high and rolling, and contains 160 acres, with walnut and pecan trees and other valuable timber thereon. These representations are false, but A makes them without actually knowing of their falsity and because the same statements have been made to him by a

[206] Dawe v. Morris, 149 Mass. 188, 21 N. E. 313.

former owner who has seen it. Are these misrepresentations made with knowledge of their falsity? No. In an action for deceit A should not be held liable; but perhaps he has made misrepresentations, when trust and confidence are placed in him, so that the contract is voidable.[207]

(2) D agrees to hire S, as teacher, if she succeeds in getting a certificate in a certain examination to be given at an institute then in session. B, assuming to know, assures D that there is to be no examination and applies for the job, and it is given him because of his representation. This is false and D breaks the contract with B. Can B recover damages? No. The contract is voidable because B made a misrepresentation of fact as of his own knowledge.[208]

§ 87. A representation is made with the intent that it shall be acted upon when it is made to be communicated to the injured person though not made directly to him.

ILLUSTRATIONS.

(1) A states to Dun's & Bradstreet's Commercial Agencies that he is proprietor of a business carried on under the name of "New York Pie Company." B questions Dun and Bradstreet, and, relying on this statement of A, sells goods to the New York Pie Company. Is A estopped from denying liability? Yes. When he makes the representation to the agency, he must intend that it shall be communicated to their patrons and acted on by them.[209]

(2) In order to be allowed to do business in Massachusetts, a corporation files a certificate with the commissioner of corporations. This contains a false statement as to its capital stock. A is induced thereby to take notes of the corporation. Is the corporation liable to A for the fraudulent statement? No. It is intended only for the state officials and not for the public or any class of which A may be a member.[210]

§ 88. The representation is reasonably relied and acted on though not the sole inducement to the making of the contract, provided it is a material inducement. Where it is a material inducement the party to whom it is made is not required to make further investigation.

Deceit which does not affect conduct cannot affect contract.

[207] Merwin v. Arbuckle, 81 Ill. 501.

[208] School Directors of Union Dist. No. 2 v. Boomhour, 83 Ill. 17.

[209] Stevens v. Ludlum, 46 Minn. 160, 48 N. W. 771.

[210] Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267.

ILLUSTRATIONS.

(1) A buys some mining stock of B, the latter making certain representations in regard to the same, but A admits that he considered what B said was wind, and that he saw other men to see whether they would corroborate B's statements. Are these representations reasonably relied and acted upon? No. A makes his purchase upon his own information and not upon that given him by B.[211]

(2) In the sale of carpets J represents that the amount is 900 yards, when it is only 595, and L, in buying, relies upon this representation without measuring the carpets for himself. Is this reasonable reliance? Yes. But if it had been a sale of land where the boundaries were pointed out, he would have had no right to rely on the statement as to quantity.[212]

§ 89. Injury means the violation of a legal right, actual damage not being essential.

§ 90. Fraud renders a contract voidable at the option of the party misled. Therefore, he may repudiate it or affirm it within a reasonable time after learning of the fraud except as against innocent third parties; but in order to do so he must place the other parties in statu quo.

ILLUSTRATIONS.

(1) R is induced by the B railroad to enter into a contract in which, for the privileges of membership in a relief and hospital association without further charge, he gives up any claim for damages against the railroad company for injuries sustained. R is injured by the negligence of the railroad and receives medicine and attendance from the hospital and relief association. Can he recover damages from the railway? No. He cannot retain the fruits received under the contract, ratifying the same to this extent, and at the same time repudiate his own obligations thereunder.[213]

§ 91. Physical restraint either in or out of prison, or with or without legal process, renders a contract voidable at the election of the person thereby coerced to make the same.

This is duress of imprisonment and the vitiating circumstance therein is the fact that freedom of assent is destroyed by the physical restraint.

[211] Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138.

[212] Lewis v. Jewell, 151 Mass. 345, 24 N. E. 52.

[213] Petty v. Brunswick & W. R. Co., 109 Ga. 666, 35 S. E. 82.

ILLUSTRATIONS.

(1) A accuses B of stealing some of his cattle telling him he has a warrant for his arrest and keeps guard over him so as to keep him under his control until B, in order to be released from this restraint, enters into a contract. Is this contract voidable? Yes. Because of the duress of imprisonment.[214]

(2) A, who is detected defrauding B, is taken to prison and his imprisonment is prolonged in order to get him to give a note in settlement of what he cheated B out of. This note is finally executed. Is it voidable for duress? Yes. The assent to the contract is not free.[215]

(3) A has B arrested and lodged in jail under a void process and, in order to get his release, B signs a contract not to sue A for damages. Is this contract voidable for duress? Yes.[216]

(4) A, in order to get settled a disputed claim between him and B, has B arrested without probable cause and, in order to get out from under arrest, B assents to a contract releasing a part of a just claim. Is this release voidable for duress? Yes.[217]

§ 92. Threats of imprisonment with or without warrant issued or threats of bodily harm to a person himself or a near blood relative, or threats of criminal prosecution, render a contract voidable at the election of the person thereby coerced to make the same.

This is duress per minas, and freedom of assent is precluded by the fear generated so that the assent is not really his own but that of others. At the common law, fear of imprisonment or fear of loss of life or fear of loss of limb or fear of mayhem was essential, but in modern law a fear of battery is included as well as a fear of criminal prosecution. At the common law, also, the threats were required to be such as to overcome a mind of ordinary firmness but, generally, in modern law the criterion is whether the threats overcome the mind of the particular person taking into consideration the quality of his mind and all the circumstances. The threat of imprisonment does not need to be of unlawful imprisonment; it is enough if the threat is of imprisonment

[214] Foshay v. Ferguson, 5 Hill (N. Y.) 154.

[215] Schommer v. Farwell, 56 Ill. 542.

[216] Guilleaume v. Rowe, 94 N. Y. 268.

[217] Watkins v. Baird, 6 Mass. 506.

which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract.

ILLUSTRATIONS.

(1) By threats to take B's life, P induces B to execute a deed conveying to him the title to land owned by B. Is this deed voidable for duress? Yes. A contract procured through fear of loss of life, produced by the threats of the other party, lacks an essential element of consent and may be avoided for duress.[218]

(2) L is arrested and brought before a justice of the peace who, thinking that he cannot lawfully take a bond for L's appearance at court, notifies him that unless he executes another bond for the maintenance of an alleged illegitimate child he will be sent to prison. Is the second bond voidable for duress? Yes. A bond executed through fear of unlawful imprisonment may be avoided.[219]

(3) M tells Mrs. B that her husband has committed a state's prison offense and unless she will sign a mortgage he will send her husband to state's prison and, from fear of this threat, she signs the mortgage but does not sign the note. The note signed by the husband and the mortgage signed by the husband and wife are assigned to an innocent third party. Is the mortgage voidable for duress? Yes. A threat to imprison the husband is sufficient to amount to duress on the wife. The innocent third party is not protected because the wife did not sign the note and the mortgage is only a chattel.[220]

(4) H signs a note because of a threat against G, but no threat is made to H. Is the contract voidable as to H? No. His assent is free.[221]

(5) C signs a note and mortgage because of a threat that unless he does so his son will be sent to state's prison for the crime of forgery. Is this contract voidable? Yes. The assent procured by a threat to put a child or a member of the family in prison is not free but given under duress[222]

§ 93. A threat to detain or destroy property when no ready or adequate remedy lies open in case the property is destroyed, renders a contract voidable at the election of the person thereby coerced to make the same.

This is called duress of goods and is a further extension of the common-law doctrine of duress per minas.

[218] Brown v. Pierce, 74 U. S. (7 Wall.) 205.

[219] Inhabitants of Whitefield v. Longfellow, 13 Me. 146.

[220] First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. 165.

[221] Robinson v. Gould, 65 Mass. (11 Cush.) 55.

[222] Harris v. Carmody, 131 Mass. 51.

ILLUSTRATIONS.

(1) A is a dealer in oysters and is owing a debt of $1,000 to B, and, in order to injure A, B claims that A owes him $3,000 and has assigned his property to defraud his creditors, and B levies a writ upon $5,000 worth of A's oysters. In order to prevent the oysters from spoiling, A pays the extra $2,000 and executes a release to B for all damages caused by such attachment. Is this release voidable for duress? Yes.[223]

§ 94. Duress in execution (compulsion) makes the agreement void, but duress in inducement makes the contract voidable only. In the latter case the one coerced may avoid the contract within a reasonable time, by placing the other party in statu quo, or he may ratify it. Innocent third parties are protected in the case of conveyances of land and commercial paper.

The reason why the agreement is void where there is duress in execution is because there is no assent whatever. It is the same thing as though the party practicing the duress should forge the other person's signature in his absence. As in the case of fraud, third parties are protected in the case of commercial paper because of the doctrine of negotiability, and in the case of conveyances of land because of the sanctity given to the registry system, but they are not protected in the case of ordinary contracts because the person upon whom the duress is practiced is not at fault to the same extent as the person upon whom fraud is practiced.

ILLUSTRATIONS.

(1) In order to compel D to execute to him a deed to large quantities of land S imprisons him, chains him to the floor, manacles him, hangs him, whips him with a raw hide and threatens him with death unless he will execute the deed, and in order to save his life D signs the deed. S records this instrument and then sells the land to W, an innocent third party. Can D avoid the deed for duress? No. The deed is only voidable and cannot be avoided after the rights of innocent third parties have intervened.[224]

(2) A, by imprisonment of P, gets him to sign a promissory note for $2,500. This A sells to C, an innocent third party. Is the note voidable

[223] Spaids v. Barrett, 57 Ill. 289. [224] Deputy v. Stapleford, 19 Cal. 302.

for duress as to C? No. He is an innocent third party. The contract is only voidable and, of two innocent parties, the one should suffer who makes the loss possible by allowing the note to get into circulation with his name attached.[225]

§ 95. If a person is constrained to enter into a contract by an influence in the nature of compulsion which destroys his free agency and determines his will to the advantage of another, the influence is undue and the contract is voidable at the election of the one upon whom it is practiced.

Fair argument and persuasion, solicitation and importunity, suggestion and advice, appeals to the emotions and the affections, while they are all forms of influence, have no effect on the validity of a contract. In order to avoid a contract, the influence must be undue. In order to be undue, the influence must overcome the will of another. This is accomplished by unconscientious use of power arising out of those circumstances and conditions which raise a presumption of fraud. Weakness of mind though it may not be such as to make a person incapable of entering into a contract, or taking advantage of one's necessitous condition, or a misstatement that does not amount to fraud, or a nondisclosure, or circumstances of oppression not amounting to duress, or inadequacy of consideration which, in itself, does not affect a contract, any one of these may be an important element in establishing undue influence. If a person is of full capacity, within reach of good advice, and in no such immediate want as to put him at the mercy of unscrupulous speculators, undue influence will not be presumed, and it will have to be proven, but there are conditions where the presumption of undue influence arises.

§ 96. Where there is a confidential relation existing between the parties, there is a presumption of undue influence, and this continues after the actual termination of the relation until there is a complete emancipation. Among such relationships are those

[225] Clark v. Pease, 41 N. H. 414.

of parent and child, husband and wife, guardian and ward, attorney and client, trustee and beneficiary, physician and patient, spiritual advisers and those advised.

ILLUSTRATIONS.

(1) A, a resident of St. Paul, who has a large amount of property, has two daughters, B and C, residing in California. B returns to St. Paul and lives with A until his death. Up to the time of B's return, A has thought as much of one daughter as of the other, but soon thereafter he is affected with a strong prejudice against C. B secures A's entire confidence and prevails upon him to deed his entire property to her child, without any consideration. A is a man addicted to drink, old and somewhat infirm. Are these deeds voidable for undue influence? Yes. All of these facts taken together raise a strong presumption of undue influence, and it has not been overcome. Facts, even though circumstantial, which show that one person overpowers and subjects the will of another to his own will, make a case of undue influence.[226]

(2) E gives a deed of her land to her father. After her death, her heirs claim that this deed is voidable for undue influence because of the relationship between the parties, but show nothing else to establish undue influence. Is the deed voidable? No. The relationship of parent and child alone is not sufficient to avoid the deed. If undue influence is relied upon, it must be proven.[227]

(3) A is guardian of B, but his guardianship terminates in 1871. In 1872, he procures a deed from his former ward without disclosing the real value of the land conveyed. Does the presumption of undue influence arise in this transaction? Yes. The relationship is still such that the former guardian must take no undue advantage.[228]

§ 97. Where there is no confidential relationship between the parties, the presumption is that undue influence has not been used and the burden of proof is on the one asserting the contrary.

ILLUSTRATIONS.

(1) A, being pressed for money, appeals to B for a loan to pay some $2,600 of indebtedness. B agrees to make a loan of $10,000 upon condition that A will buy of him a tract of land on which he places an exorbitant price. A assents to these terms. Is the contract of purchase

[226] Graham v. Burch, 44 Minn. 33, 46 N. W. 148.

[227] Jenkins v. Pye, 37 U. S. (12 Pet.) 241.

[228] Wickiser v. Cook, 85 Ill. 68.

voidable? Yes. There is no confidential relationship here, but A has proven that undue influence is actually the cause of his entering into this contract by showing that B has taken an unconscionable advantage of his financial embarrassment.[229]

§ 98. Questions of undue influence are rarely settled by presumption alone. Undue influence must be found as a fact, but the more circumstances of confidence, weakness of mind, inadequacy of consideration, misstatement, nondisclosure and oppression that can be shown to exist, the stronger grows the presumption until at length it becomes well nigh incontrovertible.

ILLUSTRATIONS.

(1) A is an old woman, seventy-two years of age, feeble in health, illiterate and excitable. P is, and has been for a long period her trusted friend and adviser and has had charge of her property. A is threatened with a suit of slander and, fearing she may lose her property, applies to P for advice. As a result of her conference, A, without valuable consideration, deeds her property to P's minor son, P going with A to the lawyer who draws up the papers. Is this deed voidable? Yes. Here there is a confidential relationship, weakness of mind, and inadequacy of consideration, and possibly nondisclosure of the legal effect of the deed, all of which are enough to establish such a presumption of undue influence without any express showing that only the strongest evidence of good faith will overcome it.[230]

(2) A, a boy, who has been working for his grandfather, B, during his minority, is entitled to $500 as wages, and is persuaded by B's executor, who is A's uncle, to accept forty acres of rocks worth not more than $200 in settlement. The boy is simple and uneducated. The uncle has been a justice of the peace for years. Is this settlement voidable? Yes. The fact of confidential relationship, due to both blood and business relations, the difference in their mental ability, and the inadequacy of consideration taken together, made out a case of undue influence.[231]

§ 99. Undue influence renders the contract voidable at the election of the party unduly influenced. He may either ratify it or, except as to innocent third parties, disaffirm it, within a reasonable time after

[229] Hough's Adm'rs v. Hunt, 2 Ohio, 495.

[230] Ryan v. Price, 106 Ala. 584, 17 So. 734.

[231] Hall v. Perkins, 3 Wend. (N. Y.) 626.

the dominating influence ceases to affect him; but, to avoid his contract, he must return what he has received.

ILLUSTRATIONS.

(1) P, an old, eccentric and illiterate woman conveys her land to C, her spiritual adviser in the Roman Catholic Church, for $1,000, when he is her sole adviser about the transaction, and when she does not understand the legal effect of her act, and he does not apprise her of it. In order to avoid the conveyance, must P return the $1,000? Yes.[232]

[232] Corrigan v. Pironi, 48 N. J. Eq. 607, 23 Atl. 355.

CHAPTER V.

PARTIES.

I. Certainty, § 101
II. Competency, § § 102-120
    A. Sovereign states, § 102
    B. Corporations, § 103
    C. Infants, § § 104-111
        1. Void agreements, § 105
        2. Valid contracts, § 105
        3. Voidable contracts (executed and executory), § § 105-111
            a. Disaffirmance, § § 106-107, 109-111
                (1) Realty, § 106
                (2) Personalty, § 106
                (3) Return of consideration, § 107
            b. Ratification, § § 108-111
    D. Persons non compos mentis, § § 112-117
        1. Void agreements, § 113
        2. Valid contracts, § 113
        3. Voidable contracts, § § 113-117
            a. Disaffirmance, § § 114-117
            b. Ratification, § § 114-117
    E. Married women, § 118
    F. Aliens, § 119
    G. Others incompetent at common law, § 120
III. Privity, § § 121-130
    A. Agency, § § 122-126
        1. Authorized, § § 123-124
            a. Agency known, § 123
                (1) Principal disclosed, § 123
                (2) Principal undisclosed, § 123
            b. Agency unknown, § 124
        2. Not authorized, § § 125-126
            a. A principal named, § 125.
                (1) Capable of authorizing, § 125
                (2) Not capable of authorizing, § 125
            b. No principal named, § 126
    B. Assignment, § § 127-130
        1. By the promisor, § 127
        2. By the promisee, § 128
            a. Common law, § 128
            b. Equity, § 129
            c. Statute, § 130

IV. Number, § § 131-134
A. Joint, § 132
B. Several, § 133
C. Joint and several, § 134

§ 100. An agreement implies at least two parties. In order that it may be enforcible at law, the parties must be definite and ascertained, must be competent to contract and must join in the agreement.

Parties are either natural (human beings) or artificial (corporations). Natural persons have the general power of making all agreements; and artificial persons have the special power of making such agreements as are allowed by their charters; but there are several ways in which natural persons may become incapable, in whole or in part, of making agreements that are obligatory. Privity of contract is another essential and, except as extended by the doctrines of agency and assignment, no one can either make himself, or be made, a party to a contract, unless he joins in the agreement. However, it should be noted that in many transactions where no contractual obligation exists because of lack of capacity or lack of privity, quasi contractual obligations may exist, and recovery may be permitted on this other ground. These questions have been considered in the chapter on quasi contracts.

§ 101. The parties must be definite and ascertained.

It is the essence of obligation that it be imposed on definite parties. A man cannot be bound by a floating obilgation to an unascertained person any more than he can be under obligation to himself. He cannot be under obligation to the entire community nor can the whole community be under obligation to him. Obligations correspond to rights in personam, not to rights in rem.

ILLUSTRATIONS.

(1) An administrator is indebted to his estate and, for the purpose of securing the debt, executes a note and mortgage, payable to himself as administrator. Are these valid? No. There must be the concurrence of two minds. A person cannot by his promise confer a right against

himself. The estate in this case is not a second party because the administrator is the only one who has assented. The estate and representative are not ascertained.[233]

§ 102. A sovereign state may enter into an agreement which it can enforce, but no one can enforce an agreement against such a state without its consent, either general or given in the particular case; this consent has been generally given by states to their citizens.

Under this proposition foreign sovereigns and their representatives are held not to be subject to the jurisdiction of courts in this country unless they submit to it. They can sue to enforce agreements but cannot be sued unless they so choose. A remedy against the United States has been given by the establishment of a court of claims.[234]

§ 103. A corporation can make agreements that are enforcible only when expressly or impliedly authorized by the charter of its incorporation, it having implied authority to make such contracts as are reasonably necessary to the exercise of a power expressly conferred or to carry out the legitimate purposes and advance the objects of its creation. Within the scope of its powers, unless restricted, it may contract as a natural person.

A corporation is a legal entity, created by law, and consequently possesses only those powers conferred upon it by the act of its incorporation. An act outside the scope of its powers is called ultra vires, but if a corporation or one dealing with a corporation receives a benefit under an agreement that is simply ultra vires but not against public policy or actually prohibited, though the agreement may not be enforcible, the value of the benefits may be recovered as was learned in the consideration of quasi contracts.[235]

[233] Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231, 22 Atl. 572.

[234] Hans v. Louisiana, 134 U. S. 1.

[235] Bank of Augusta v. Earle, 38 U. S. (13 Pet.) 519; Louisiana v. Wood, 102 U. S. 294; Davis v. Old Colony R. Co., 131 Mass. 258.

§ 104. An infant is a person under the age of twenty-one years except where the age of majority for women has been changed by statute to eighteen.

An infant attains his majority the earliest moment of the day preceding the twenty-first, or eighteenth, anniversary of birth (according to the age of majority).

This period of immaturity is fixed arbitrarily by law so far as any one person is concerned, though it is the period which seems generally to correspond with the facts. The reason for the rule as to the time when an infant attains his majority is just as technical, and is that the law disregards fractions of a day. The right to determine the period of minority is a legislative right and, therefore, the legislature can change the time, so that when the legislature makes an infant's marriage or enlistment above a certain age valid it really makes him of age for those purposes, after the time set.

ILLUSTRATIONS.

(1) A, a boy, is born on the first day of January, 1879. When will he become of age? He will become of age the 31st day of December, 1900.[235]

§ 105. An infant's marriage and his agreements made under authority of statute or to discharge other legal obligations resting on him are valid. In some jurisdictions, his power of attorney and, in all, his agreements made while under guardianship, are void. All other contracts of an infant are voidable by him but binding on the other party.

The disability and exemptions imposed on and granted to an infant are for his benefit and for the reason that the law recognizes the actual condition of man. Up to a cer-

[235] Bardwell v. Purrington, 107 Mass. 425; In re Morrissey, 137 U. S. 157.

tain age a person is incapable of acting with discretion and that he may not prejudice himself or suffer imposition it protects him by allowing him to avoid his contract, in spite of the fact that all other essentials to enforcibility may be present, and this is so even though he falsely represents himself to be of age. His marriage contract, above the age of consent, is held valid on grounds of public policy, for marriage is not only a contract, it is also a status. An infant's obligation to pay for necessaries is sometimes called a valid contract, but it is rather a quasi contractual obligation. The doctrine which imposes the quasi contractual obligation for necessaries is not in conflict with the general policy of the law to protect the infant, but rather for the same purpose. Most courts hold that an infant's power of attorney is void so that it binds neither the infant nor the adult, but a few courts claim that there is no distinction between this agreement and any other, and that an infant ought to be able to do through an adult of capacity as much as he can do through his own incapacity.

ILLUSTRATIONS.

(1) A, a female, between fifteen and sixteen, without the consent of her parents, marries B, an adult. Is the marriage valid? Yes. At the common law, infants may contract valid marriages, males at the age of fourteen and females at the age of twelve, though this age has generally been raised by statute to eighteen for males and fifteen for females.[237]

(2) W, an infant, signs an instrument making his father, R, his agent, for the purpose of making the agreement, and the father agrees in writing under seal to sell N after W becomes of age, a certain tract of land. Can W ratify this agreement after becoming of age? No. There is no agreement to ratify as the appointment of the agent is void.[238]

(3) B, while an infant, executes to W a deed of trust to certain land. The debt secured, not being paid, W deeds the land to F. After becoming of age, B deeds the same land to M. Is M entitled to hold the land? Yes. B's deed to W is voidable.[239]

[237] Bennett v. Smith, 21 Barb. (N. Y.) 439.

[238] Trueblood v. Trueblood, 8 Ind. 195.

[239] Tucker's Lessee v. Moreland 35 U. S. (10 Pet.) 58.

§ 106. Unless previously ratified by him, an infant may disaffirm all of his voidable contracts; if executory so far as he is concerned, at any time either before or after his majority; if executed so far as he is concerned, those relating to personalty at any time during his minority or within a reasonable time after reaching his majority; and those relating to realty, within a reasonable time after reaching his majority.

An infant may disaffirm his voidable contracts by any word or act clearly evincing to the other party that he renounces the same.

If an infant is sued on a voidable contract, he can always interpose his infancy as a defense. Personal property is perishable, and for his protection it is necessary to allow him to disaffirm his contracts in regard thereto, even though yet a minor. A contract executed by an infant is ratified by nonaction unless disaffirmed before the expiration of a reasonable length of time after majority. What this time is depends on the circumstances of each case.

ILLUSTRATIONS.

(1) B, a minor, executes a conveyance of realty to W. Can he bring an action of ejectment and thus disaffirm his conveyance before reaching majority? No. An infant's conveyance of realty cannot be disaffirmed by him until after reaching majority. Had the minor, in this case, only promised to execute the conveyance, he could have set up his infancy as a defense to a suit for specific performance by the other party.[240]

(2) A, a minor, sells B, a minor, certain goods. Thereafter, but before reaching majority, A gives a bill of sale of the same goods to C. Is C entitled to the goods as against B? Yes. This act evincing his intention to renounce the first sale disaffirms his contract and, if the minor ratifies the bill of sale after becoming of age, C has a perfect title.[241]

[240] Welch v. Bunce, 83 Ind. 382.

[241] Chapin v. Shafer, 49 N. Y. 407; Shipman v. Horton, 17 Conn. 481.

§ 107. It is not necessary for the infant to return or offer to return what he has received under a contract as a condition precedent to its disaffirmance; but, if he avoids his contract, he will be required to make restitution of that which remains in specie at the time of disaffirmance.

The question of the return of consideration does not arise where the contract is executory on both sides, or even so far as the adult is concerned, but only when executed by the adult. Some courts hold that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits received are such that he cannot return them, and the contract is fair and reasonable and free from any fraud or overreaching, he cannot disaffirm it. In any case, where an infant asks for equitable relief, if he would have equity, he must do equity, which may include returning the consideration.

ILLUSTRATIONS.

(1) M, a minor, borrows of S seventy dollars by giving a mortgage on a pony and a yoke of oxen. On default, S takes the pony and oxen, sells them at auction, and bids them in himself. After becoming of age, M gives notice of his disaffirmance, and on S's refusal to surrender the stock, M sues him for conversion, without offering to return the money borrowed. Can he maintain his action? Yes. If an infant were not allowed to prevail, his contracts would have to be held valid.[242]

§ 108. No voidable contracts of an infant may be ratified before majority, but unless previously disaffirmed all may be ratified after majority, executory, either by express ratification or by any act or declaration by him to the other party, recognizing his former contract as binding; executed, by mere acquiescence for an unreasonable length of time.

It requires the same capacity to make a voidable contract valid as to make a valid contract in the first instance.

[242] Miller v. Smith, 26 Minn. 248, 2 N. W. 942. But see MacGreal v. Taylor, 167 U. S. 688, and Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992.

Contracts executed by the infant are ratified by nonaction unless disaffirmed within a reasonable length of time after majority, but contracts executory as to him may be disaffirmed at any time before ratification. They cannot be enforced without a ratification.

ILLUSTRATIONS.

(1) R, a minor, gives a note for $600 to H, an adult, for a deed to certain land and, after becoming of age, sells a portion of the land covered by the deed to another party. Is this contract ratified? Yes. The sale of the land is an act which recognizes his former promise as binding. After ratification it is no longer possible for the former infant to disaffirm his contract.[243]

(2) A, a minor, conveys land to B and, after arriving at majority waits seventeen years without excuse before attempting to disaffirm. Is the contract ratified? Yes. Silence and nonaction for an unreasonable length of time will amount to ratification of a contract executed as to the infant.[244]

(3) A, an infant, executes a promissory note to B. After reaching majority he tells a stranger that he ratifies the note. Is this a sufficient ratification? No. The ratification must be made to a party in interest and not to a stranger.[245]

§ 109. The remedy of specific performance is not allowed, either at the suit of an infant or against an infant, during his infancy.

As no obligation can be forced on him without his consent, if the contract is still executory as to him, the infant can always refuse to go on further with it; but the converse of this statement is also true and, if his contract is executory, the infant cannot during infancy compel specific performance of it. If he should be allowed to carry out his contract it would either have to be declared valid or he would still have the right to disaffirm it after becoming of age, and thus make of no effect the decree of the court, rather than permit which a court of equity asks him to wait until his act will be valid.[246]

[243] Henry v. Root, 33 N. Y. 526.

[244] Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697.

[245] Goodsell v. Myers, 3 Wend. (N. Y.) 479.

[246] Flight v. Bolland, 4 Russ. 298; Richards v. Green, 23 N. J. Eq. (8 C. E. Green) 536.

§ 110. Disaffirmance annuls the contract on both sides ab initio, and thereafter the rights of the parties are just what they were before the contract; the contract cannot subsequently be ratified, and innocent third parties are not protected.

Ratification makes the contract valid and constitutes a waiver of the right to avoid.

As the contract is completely annulled, and the parties stand as though no contract had been made, the infant or former infant can sue to recover the value of any services rendered or goods delivered under the contract, but these are other examples of quasi contracts. Third persons, even bona-fide purchasers of commercial paper, are bound to know whether or not the makers have capacity to contract.[247]

§ 111. The right to elect, whether to ratify or disaffirm his voidable contracts, is the personal privilege of the infant or, in case of his death, of his personal representative.

§ 112. A person is said to be of unsound mind (non compos mentis) when his mental faculties are in such condition that he is unable to understand the nature and effect of a contemplated act.

Temporary or recurrent derangement makes one non compos mentis only while not in the possession of his faculties; and partial derangement makes one non compos mentis only on the subject of the derangement.

Mere weakness of mind, or deafness, or drunkenness, or blindness, or senility, does not in itself make one non compos mentis, but unsoundness of mind may result from drunkenness, imbecility, or lunacy. An imbecile is one who

[247] Downing v. Stone, 47 Mo. App. 144.

from birth is without reason. A lunatic is one who has possessed reason, but who has lost it in whole or in part.[248]

§ 113. A marriage and a power of attorney of a person non compos mentis are void.

After he has been adjudged incompetent, all the attempted contracts of a person non compos mentis are void.

The contracts of a person non compos mentis are valid if fair and beneficial to him and so far executed that the parties cannot be placed in statu quo, and the person non compos mentis is not under a conservator, is apparently of sound mind, and the other party does not know of his infirmity.

Contracts made by a person non compos mentis during a lucid interval, or by a monomaniac on a subject not affected by his mania, are valid.

All other contracts of a person non compos mentis are voidable as to him but binding on the other party.

In determining contractual capacity, the law does not measure the different degrees of mental capacity that men acquire from breeding, education and pursuits, nor does it recognize as incompetency, ignorance, improvidence, visionaryness, partial derangement, or mere drunkenness, in itself. It requires a deficiency of mind such as to make one, at the time of the contract, incapable of understanding the nature and effect of the transaction. Like infants, persons non compos mentis may incur quasi contractual obligations.

ILLUSTRATIONS.

(1) O, an insane person, executes and delivers a conveyance of land before any finding of lunacy and receives the purchase money. The purchaser has no knowledge of the lunacy and the contract is fair and reasonable, but O does not offer to return the purchase price. Can he disaffirm? No.[249]

[248] Stone v. Wilbern, 83 Ill. 105.

[249] Gribben v. Maxwell, 34 Kan. 8, 7 Pac. 584; Molton v. Camroux, 4 Exch. 17; Lancaster County Nat. Bank v. Moore, 78 Pa. 407.

(2) A and B exchange lands, and B agrees to pay A $1,000, in addition to his land for that of A. If B is, at the time so intoxicated that he does not understand the nature of the act, can he avoid the contract? Yes. It makes no difference whether the intoxication is procured by A or is voluntary, so far as civil matters are concerned.[250]

§ 114. The person non compos mentis may disaffirm or ratify his voidable contract, within a reasonable time after being restored to soundness of mind, by any word or act which clearly evinces to the other party either that he recognizes his former contract as binding or that he renounces it, (as the case may be).

ILLUSTRATIONS.

(1) A, an insane person, deeds land to I. Subsequently, during a lucid interval, A accepts part of the purchase price for the land. Is this a ratification? Yes.[251]

§ 115. In order to rescind his voidable contract, if the other party is ignorant of his incapacity, the person non compos mentis must place him in statu quo.

ILLUSTRATIONS.

(1) A, while insane, sells certain land for a sum of money paid him. The sane party acts in good faith. Can A disaffirm his deed without offering to return what he received therefor? No.[252]

§ 116. The effect of disaffirmance is to leave the parties as though no contract had ever been made. The contract cannot thereafter be ratified, and innocent third parties are not protected except as against drunkards.

Innocent third parties are protected against drunkards on contracts made while intoxicated because the case is analogous to fraud.[253]

[250] Barrett v. Buxton, 2 Aiken (Vt.) 167.

[251] Arnold v. Richmond Iron Works, 67 Mass. (1 Gray) 434.

[252] Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Joest v. Williams, 42 Ind. 565.

[253] Tucker's Lessee v. Moreland, 35 U. S. (10 Pet.) 58; Youn v. Lamont, 56 Minn. 216, 57 N. W. 478

§ 117. The right to avoid or ratify his voidable contract is the personal privilege of the person non compos mentis or of his subsequently appointed guardian, or of his heirs and personal representatives, after his death.

§ 118. At the present time, a married woman, generally, has full contractual capacity, but, at the common law, she was absolutely incapacitated except when her husband was civilly dead or had wholly abandoned her, renouncing the marriage relation, or was a nonresident alien.

At the common law, on marriage, the husband and wife legally became one person, and that one, the husband. Therefore, as it takes two people to contract, not only could the husband and wife not contract with each other, but the wife could not contract at all. As a result of the common law rule, the husband also became owner of all the wife's chattels and was entitled to all of her earnings. The removal of these common law disabilities has generally been accomplished by statute, although in equity a married woman has always had power to contract with reference to her separate estate.

ILLUSTRATIONS.

(1) W executes and delivers to his wife, C, a trust deed on certain land situated in the state of Colorado. Is this deed valid? Yes. Under the statutes of Colorado the theoretical unity of husband and wife is severed, so far as the power to contract is concerned, and each may contract with the other, or alone with third parties, in regard to all matters.[254]

§ 119. Alien friends, ordinarily, have the same contractual power as the subjects of a state; but alien enemies cannot enter into any contracts with subjects that are inconsistent with a state of war, nor enforce in time of war any contracts made in time of peace.

An alien is a subject of a foreign state, and is called friend or enemy according as to whether his country is at war with

[254] Wells v. Caywood, 3 Colo. 487. See Tracy v. Keith, 93 Mass. (11 Allen) 214.

the United States. Generally a contract made by an alien in time of peace, is annulled by war, but, if it is one capable of surviving, it is merely suspended during the time of hostilities.

ILLUSTRATIONS.

(1) At the time the war of the Rebellion breaks out, E, of Georgia, is indebted to G, of New York, and while the war is in progress, through the medium of a third person, G offers to take and E promises to give, certain cotton in settlement. This cotton is later captured by Federal forces and reported as G's cotton and sold. Has G a claim against the United States? No. This act of commercial intercourse is unlawful and, therefore, G never became the owner of the cotton and, not being the owner of it, he has no claim against the United States.[255]

§ 120. At the common law, various other persons, including outlaws, convicts, ex-communicants, slaves, barristers and physicians, were incapacitated to a greater or less extent; but the common law disabilities, attaching to these persons, have been removed in modern times.

§ 121. A person who is not a party to an agreement cannot be a party to the obligation which that agreement creates; but one may become a party to both the agreement and the obligation through the medium of an agent or by stepping into the place of one who is already a party.

The parties to an agreement can impose an obligation on a third person neither for their own benefit nor for his benefit. No one can have a contractual obligation thrust upon him without his consent. Yet a third person who is not a party to an agreement, but for whose sole benefit it is made or to whom the promisee is under existing legal obligation, is permitted to sue on the contract. This, however, is not on the theory that the parties have created an obligation for him but that the law operating on the acts of the parties establishes the privity and creates the obliga-

[255] United States v. Grossmayer, 76 U. S. (9 Wall.) 72. See Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 610; Taylor v. Carpenter, 3 Story, 458, Fed. Cas. No. 13, 784.

tion. This obligation then, being quasi contractual in nature, has been more appropriately considered in the chapter on quasi contracts. So, likewise, the law sometimes imposes a duty in rem on all persons not to interfere with a contractual obligation created. But this duty lies in the realm of torts and, therefore, does not belong to this discussion. Where a third person takes the place of a debtor, by consent of the debtor, creditor and person substituted, then the transaction is known as novation and the ordinary rules for the formation of a contract apply and this subject also does not need consideration here.

§ 122. One may enter into a contract through the instrumentality of another authorized to act for him and called his agent.

It is not necessary that the parties, themselves, shall communicate their consent to each other. There are various mediums through which it may be communicated, and one of them is that of agency. The giving and accepting of authority to act as agent constitute a separate contract with its rights and liabilities, but with that, in this work, we are not concerned, but only with the manner in which agents are able to bring their principals into contractual relations with others. Agency, except to execute a deed, may be created by word or conduct, or ratification, or estoppel. It may be terminated by the act of the parties in revoking or renouncing the agency, or by operation of law as in the case of death or insanity. If an agent is authorized to represent his principal in all matters of a particular class, he is a general agent; if only on one occasion, or in one transaction, a special agent. A principal can be bound on a contract, made by an agent, only by force of previous authority given to the agent, or by subsequent ratification of his act, but if the principal either authorizes or ratifies the contract he is bound because the contract is then his own.

§ 123. When a contract is made by an authorized agent known to be an agent, whether the principal is named at the time or not, the principal is a party

to the contract unless it is a deed purporting to be the deed of the agent. If the principal is named, the agent cannot also be a contracting party unless he contracts in his own name without qualification. If the principal is not named, the agent is also a party unless he eliminates himself by express stipulation.

ILLUSTRATIONS.

(1) A is authorized by B to buy a horse for him. A informing C that he is acting for B, enters into a contract of purchase with C. Here A drops out, for C looks only to B, and B and C alone come into contractual relations. The only question under such circumstances is as to the existence of the agent's authority, unless, for example, he should sign a written contract promising in his own name to buy the horse.[256]

(2) If A, in the above illustration, though authorized by B, should not inform C that he is acting for B, but simply that he is an agent, either A or B is a party to the contract. C looks to A, because no definite principal is named and, yet, because the existence of a principal is disclosed, he cannot object to the principal becoming a party to the contract.[257]

§ 124. When a contract is made by an authorized agent not known to be an agent, the undisclosed principal as well as the agent is a party unless the agent contracts as the real and only principal or the nature of the contract is inconsistent with an unknown principal becoming a party; but the principal must take the contract subject to all equities.

ILLUSTRATIONS.

(1) A, B and C are partners, C being a dormant partner. A and B, without disclosing C, enter into a contract agreeing to hire D for eight years on his agreement to work for that period. D may treat C as a party.[258]

(2) A, being W's agent to sell a pair of oxen, conceals his agency in the negotiation of a sale to H and when asked whether W owns them declares that W does not but that he owns them himself. H does not

[256] Nash v. Towne, 72 U. S. (5 Wall.) 689; Badger Silver Min. Co. v. Drake (C. C. A.) 88 Fed. 48.

[257] Wilder v. Cowles, 100 Mass. 487; Carr v. Jackson, 7 Exch. 382.

[258] Beckham v. Drake, 9 Mees. & W. 91.

wish to buy from W but, after this statement, buys from A. W is not a party. There is no contract with him.[259]

§ 125. When a contract is made by one who professes to act as agent but who is not authorized, if he names a principal who is ascertained and existing and might in fact be a principal the agent can in no way be a party to the contract (though he may be liable on implied warranty or for deceit), but the alleged principal may make himself a party by ratification. If the professed agent names a principal not capable of authorizing the contract, the agent only is a party.

ILLUSTRATIONS.

(1) A claiming to act for B, a man living and known, but having no authority from B, makes a contract with C to lease B's farm. A is not a party but, by ratifying the act, B can make himself a party. To hold A a party would be to make a contract not to construe one, but when B ratifies the act, there is a true agreement between C and B.[260]

(2) But if, in the foregoing illustration, B is a fictitious party, there can be no contract between B and C for there is no B, and A can be treated as a party.[261]

§ 126. When a contract is made by one who professes to act as agent but who is not authorized, if he does not name a principal he himself is the principal.

ILLUSTRATIONS.

(1) A, claiming that he is acting for another but not stating whom, contracts with C. A is really acting for himself. Is he a party with C? So far as C is concerned the contract is with A, and A may show on his part that he is the real principal.[262]

§ 127. A promisor cannot assign his liabilities under a contract so as to substitute another party for himself.

A promisee cannot be compelled to accept performance from anyone but the one who has promised, for the prom-

[259] Winchester v. Howard 97 Mass. 303; Ferrand v. Bischoffsheim, 4 C. B. (N. S.) 710. See Miller v. Lea, 35 Md. 396.

[260] Fox v. Tabel, 66 Conn. 397, 34 Atl. 101; Lewis v. Nicholson, 18 Q. B. 503; Collen v. Wright, 7 El. & Bl. 301.

[261] Kelner v. Baxter, L. R. 2 C. P. 174.

[262] Schmaltz v. Avery, 16 Q. B. 655; Carr v. Jackson, 7 Exch. 382.

isee has a right to the benefit he expects from the character, credit and substance of the promisor; yet, if the contract does not call for personal confidence and skill, without dropping out as a party, the promisor may get the work done for him by equally competent persons.

ILLUSTRATIONS.

(1) P, a corporation, rents 100 railroad wagons to L, L agreeing to pay an annual rent, and P agreeing to keep the wagons in repair. P passes a resolution to voluntarily wind up its business and then assigns to B its contract with L. Is this transaction valid? Yes. So long as P continues to exist it can be considered as performing its obligations through B. In rough work like this, it is not necessary that P shall do it in person.[263]

(2) B enters into a contract with E to supply him with lead ore in certain quantities and for certain prices, title to pass on delivery and the price to be paid after the ore is assayed by either or both of the parties. Can E assign this contract to another? No. It involves transferring personal liabilities and B cannot be compelled to accept some one whose liability he may not be willing to accept. In this sort of a case both parties to the contract are promisors.[264]

§ 128. At common law, except by negotiation of commercial paper and by marriage and death, etc., a promisee cannot assign his rights under a contract so as to completely substitute another party for himself. The most he can do is to give the assignee a right to sue in the name of his assignor (the promisee), free from his control.

According to the law merchant the promisee, in negotiable instruments, can negotiate the same so as to give a right free from defenses to one who acquires title for value, before maturity, without notice of defects, though no notice is given to the promisor. There is an essential difference between negotiability and assignability. An assignee of a contract can, at most, only step into the shoes of his assignor; an assignee of negotiable paper may have greater rights than his assignor. The promisee, by negotiating the paper, drops out except as to subsequent parties as to whom

[263] British Waggon Co. v. Lea, 5 Q. B. Div. 149.

[264] Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379.

he may enter into a new and technical contract known as the contract of indorsement. In the case of an assignment of an interest in a leasehold or a freehold, covenants that concern the land and are not merely personal pass to the assignee whether of the lessee or lessor or of the vendee or vendor. Marriage at the common law effected a substitution of the husband for the wife as a party to her contracts; but this rule is changed by statute today. Death substitutes, for a party to a contract, his personal representatives if the contract is one that the party himself could have assigned; but in such a case new parties are not really substituted for the old, for the assignment is merely a means of continuing, for certain purposes, the legal existence of the deceased. Aside from these exceptions, among the living the common law is very reluctant to permit an assignee to succeed to the position of the original promisee. An obligation is the legal chain which binds together two parties, in the case of a contractual obligation the parties to the agreement, and it is hard to conceive of unfastening one end of this chain from one man and fastening it to another again, except by a new agreement. For this reason, at the common law, the assignee has to sue in the name of his assignor, and a partial assignment is absolutely invalid, as the debtor cannot be considered to have contracted to have an obligation split up into fractions.

ILLUSTRATIONS.

(1) A assigns to S the balance due him on an account with X. He then becomes a bankrupt and his commissioners assign over his effects to his assignee. At law is S entitled to the amount of the balance? Yes. By having A sue for him, S can get this amount. The debt is due in form to A, but in substance to S and, therefore, it does not pass under the commission to the assignee. At the earliest common law the assignee acquired no right whatever. Later, as here, he could acquire a right which was enforcible by having the assignor sue for him, and the last step in the development of the common law doctrine is where the assignee can sue in the name of the assignor.[265]

[265] Winch v. Keeley, 1 Term R. 619. See Peuson v. Higbed, 4 Leon. 99.

(2) W assigns to P a debt due him from M and J. Suit is brought by P in the name of W against M and J. Can W and M and J dismiss this suit without P's consent? No. The assignor will not thus be allowed to interfere with the rights of his assignee. Otherwise, the protection of the form would defeat the whole purpose of the law.[266]

(3) A policy is issued to F in 1870. F's interest in this policy is assigned to W in 1875, but in 1878 W reassigns all but $2,000 to F, both of these assignments being on slips of paper attached to the policy, when the policy itself requires the assignments to be indorsed thereon. In 1880 F assigns the policy to H who pays valuable consideration therefor, and is without notice of the other assignments. F dies. Is W protected? No. H is entitled to the amount of the policy. W is in fault for giving the opportunity for fraud.[267]

(4) C sues S. C has agreed with his attorney, B, to pay him out of the proceeds of the judgment in this suit, and B notifies S of this. Can C and S stipulate to dismiss the suit? Yes. B's claim amounts only to a partial assignment and is, therefore, invalid.[268]

§ 129. In equity a promisee may assign his rights under a contract relating to money or specific property, and the assignee may enforce the contract in his own name if he has given a consideration for the assignment; but the assignment does not bind the original promisor until he has notice of it and then only so far as he has not, up to that time, acquired equities against the original promisee.

Rights, but not liabilities, may be assigned. Wherever a contract is coupled with liabilities or involves personal confidence and skill, it cannot be assigned. If this relates only to one party, the other party may assign his rights. If it relates to both parties, no assignment is possible. But a right to the payment of money or relating to land or chattels specified involves no such personal confidence. In equity parts of a debt may be assigned to different persons, and the entire controversy may be settled in one suit to which all are made parties. An assignor can give no better title than he himself has. An assignee is bound to take notice of the rights of a debtor and, in order to protect his

[266] Welch v. Mandeville, 14 U. S. (1 Wheat) 233.

[267] Bridge v. Connecticut Mut. Life Ins. Co., 152 Mass. 343, 25 N. E. 612.

[268] Chapman v. Shattuck, 8 Ill. (3 Gilm.) 49.

rights, he must notify the promisor of the assignment. It is only fair to the promisor or debtor that he should know to whom he is under liability, and that he should not suffer for any change in his relations that he may make before notice of the assignment.

ILLUSTRATIONS.

(1) P, a factor, sells goods for A, but, A, being indebted to P, assigns to P the debts due him for goods sold by P. P, in turn, assigns these to his creditors. Can P's creditors hold the debts against the creditors of A? Yes. In equity the title to the debts becomes P's.[269]

(2) For a loan of $100 H assigns to C his wages to be earned on a sea voyage. H dies on the voyage. His wife becomes his administratrix, and insists that there should first be paid a bond of H, given her on her marriage, to pay her $400 if she should out-live him. C is entitled to the wages. Advancing the $100 is equivalent to paying the wages beforehand, and neither the seaman nor his wife can have the wages twice.[270]

(3) F and C loan money to G who gives them an order on S to pay them the amount out of a particular fund, and F and C notify S. Is this a good assignment? Yes, in equity.[271]

(4) S builds a school house for N, and N reserves $600 as guaranty for the performance of the building contract. S assigns this $600 to J. Is the assignment to J good? Yes, if he will sue in equity, and make all those interested parties to the suit.[272]

§ 130. By statute the equitable rules have been generalized and the equitable remedies largely made legal.

ILLUSTRATIONS.

(1) H is entitled to a certain legacy from the estate of G and receives from the executors a statement of the amount due him. On this he writes an order to the executors to pay the amount to L. Is this a valid assignment so that L can sue in her own name? Yes. By virtue of the judicature act of 1873, in England.[273]

(2) G deposits with K $2,316, receiving a slip of paper with dates and various sums in a column, footing up to the above amount, but with

[269] Fashion v. Atwood, 2 Cas. Ch. 36.

[270] Crouch v. Martin, 2 Vern. 595.

[271] Row v. Dawson, 1 Ves. Sr. 331. See Cator v. Burke, 1 Brown Ch. 434.

[272] James v. City of Newton, 142 Mass. 366, 8 N. E. 122.

[273] Harding v. Harding, 17 Q. B. Div. 442.

nothing else on it. G delivers this paper to C, with the intention of giving him the money. Is this a valid assignment? No. The slip is too incomplete. After its delivery there is nothing to prevent G from recovering the deposit from K.[274]

(3) In April B assigns all the wages to be earned by him as school teacher the next calendar year. At the time he has a contract to teach until the following June. The next September he makes a new contract to teach another year. Does the assignment cover wages earned after September? No. The money to be earned under an engagement not yet made is not assignable.[275]

(4) P signs and delivers to N an "I. O. U." for $250. N keeps this in his possession until he makes an assignment to B for benefit of his creditors. Three years later he delivers the "I. O. U." to E for a valuable consideration. Does E have a right to the money from P? No. E has only the rights of his assignor and, therefore, has none, as N's rights pass to B by the assignment for creditors.[276]

(5) D, for a valuable consideration, assigns to M a note of X. Later D gets the note into his possession for a temporary purpose. H has it attached by an execution on a judgment in his favor against D. No notice of the assignment is given H. Is M entitled to the note? Yes. Notice is required only to protect the debtor (as X) or the purchaser (as Y, if D should re-sell to Y), but all that can be seized on the execution is the right remaining in the assignor which in this case is nothing.[277]

§ 131. A contract may have one promisor and one promisee, or more than one promisor or more than one promisee, or more than one party on both sides.

A joint contract is one where the promisors are either jointly bound or the promisees are jointly entitled to the performance of an obligation. A several contract is one where each promisor is individually liable or each promisee is individually entitled to the performance of an obligation. A joint and several contract is one where the promisees may elect to hold the promisors either jointly or severally bound to perform an obligation. When two or more persons undertake an obligation, the presumption is that they undertake jointly, and words of severalty are necessary to overcome

[274] Cook v. Lum, 55 N. J. Law, 373, 26 Atl. 803.

[275] Herbert v. Bronson, 125 Mass. 475.

[276] Emley v. Perrine, 58 N. J. Law, 472, 33 Atl. 951.

[277] Pellman v. Hart, 1 Pa. 263.

this presumption. In written instruments the question whether the obligation is joint or several is to be determined by looking at the words of the instrument.

ILLUSTRATIONS.

(1) An instrument contains the following: "The lessee and his sureties, J. C. and S. R., covenant with the lessors to pay the rent." This is a joint obligation. There are no words of severalty in the covenant. The sureties and the lessee undertake to pay rent as one man, and the sureties cannot be sued alone.[278]

§ 132. Joint promisors must be sued jointly, and a release of one releases all. If one dies, the rest are exclusively liable.

Joint promisees must sue jointly and a release by one operates as to all. If one dies the others may sue alone.

ILLUSTRATIONS.

(1) A performs work upon a ship under the joint directions of B and C. C dies. Is B liable for the entire value of the work? Yes. After the death of the other party a joint debt may be treated as if it were originally the separate debt of the survivor so that he can be charged in his own right, although it is better to sue him as survivor. After the death of the other joint obligors, a plea in abatement can no longer be interposed.[279]

(2) J sues D for goods sold to him by J. & Son. The son dies before the suit is brought. Can J sue in his own name? No. He should allege the fact of his being a survivor. Joint sellers must join in an action.[280]

(3) K and L sell and deliver goods to H and S jointly. K and L sue and recover judgment therefor against S who does not plead in abatement that the obligation is joint. Can K and L now sue and recover from H? No. The judgment against S is a bar. The debt, being a joint debt, is merged in the record by suit against one who does not plead in abatement just as much as though both had been joined in the suit.[281]

[278] City of Philadelphia v. Reeves, 48 Pa. 472.

[279] Richards v. Heather, 1 Barn. & Ald. 29.

[280] Jell v. Douglas, 4 Barn. & Ald. 374.

[281] King v. Hoare, 13 Mees. & W. 494.

(4) K lends money to W and N, acting for themselves and H, although H is undisclosed. K sues W and N and gets judgment. Can he now sue H? No. H's liability is a joint liability with W and N, and a suit against them is a bar to a separate suit against him. W, N and H are undisclosed principals of W and N.[282]

(5) C sues G and F on joint liability. G dies, pending suit, and C discontinues as to him, and prosecutes the suit against F to judgment which is in favor of F. Can C now sue G's administrator under a statute giving him a remedy against either the administrator of deceased or the survivor? No. The original liability is joint, and that there is no joint liability has been decided in the suit against F.[283]

(6) H sues six parties who have agreed to pay him six-sevenths of any loss he may sustain, by an indorsement of a certain note. H gives one obligor a paper under seal, "In full satisfaction for his liability." This imposes a release and discharge of him and therefore, it releases all.[284]

(7) D sues B and M on a joint obligation. B is discharged in bankruptcy. M dies. Is M's executor liable? No. The joint obligor is discharged by death, the survivor only being liable.[285]

(8) O, N and J jointly sell iron rails to the M railway, for $600. N and J settle with the railway for money and stock, giving a receipt in full. Can O, joining the others with him, recover his proportion of the $600 from the railway company? No? Each of the three has an interest, not only in a third but in the other two-thirds. O cannot bring suit for his third because the others own that as much as he, but each having an interest in the entire claim can settle for the whole.[286]

§ 133. Several promisors must be sued separately. If one dies, the obligation may be enforced against his estate.

Several promisees may each sue separately. If one dies, his personal representative may enforce his obligation.

ILLUSTRATIONS.

(1) K sells land to D, and D sells the same land to W and S. D, not paying K the purchase money, W and S "Covenant with K," etc.,

[282] Kendall v. Hamilton, 4 App. Cas. 504.

[283] Cowley v. Patch, 120 Mass. 137.

[284] Hale v. Spaulding, 145 Mass. 482, 14 N. E. 534.

[285] Martin v. Crump, 2 Salk. 444.

[286] Osborn v. Martha's Vineyard R. Co., 140 Mass. 549, 5 N. E. 486.

"and as a separate covenant" with D to pay K, or D, in case K shall have been paid his price by D, the amount of the purchase price and interest. Can K sue without joining D? Yes. This covenant is several. For where the covenant is ambiguous, it will be joint if the interest is joint, and several if the interest is several.[287]

§ 134. Joint and several promisors may be sued altogether or separately, but a release of one discharges all, and the death of one does not cast the liability on the survivors.

A promise cannot be joint and several as to the promisees.

ILLUSTRATIONS.

(1) A promissory note in the words, "I promise to pay," etc., is signed "R. B.," "T. W." This is a joint and several obligation, because of the fact that the promise begins in the singular number. The holder of the note can sue either B or W, or both.[288]

(2) P sues the executor of H who as surety has signed a joint and several obligation with B. Without the consent of the sureties, P has executed a covenant not to sue B, qualified by a reservation of remedies against the sureties. Is the executor liable? Yes. This is not a release, and operates only so far as the rights of the sureties are not affected. Had it been a release, the release of B would have released H.[289]

[287] Keightley v. Watson, 3 Exch. 716.

[288] March v. Ward, Peake, 130.

[289] Price v. Barker, 4 El. & Bl. 760.

CHAPTER VI.

CONSIDERATION.

I. Unilateral agreements, § 136
   - A. A legal right, § 136
   - B. Given in exchange for a promise of a legal right, § 136

II. Bilateral agreements, § 137
   - A. A promise of a legal right § 137
   - B. Given in exchange for a promise of a legal right, § 137

III. What is not sufficient, § § 135-137
   - A. Moral obligation, § 136
   - B. Good consideration, § 135
   - C. Gratuitous undertakings, § 135
   - D. Past consideration, § 136
   - E. Doing what already under obligations to do, § 136

IV. What is sufficient, § § 135-137
   - A. Forbearance to sue, § § 136-137
   - B. Compromises of doubtful claims, § § 136-137
   - C. Composition of creditors, § § 136-137
   - D. Subscriptions, § § 136-137
   - E. Accord and satisfaction, § § 136-137
   - F. Miscellaneous, § § 136-137

V. Adequacy, § 135

§ 135. In order to be enforcible the agreement must relate to the mutual transfer of legal rights, that is, it must be supported by a sufficient consideration.

Consideration is a legal right given or promised in exchange for a promise of a legal right. A moral obligation, or a good consideration, or a gratuitous undertaking, or a past consideration, or doing what one is already under obligation to do, is not sufficient; but forbearances to sue for a definite time, compromises of doubtful claims, compositions of creditors, subscriptions, accords and satisfactions and, in general, the giving, or promise to give, any legal rights of liberty or property, are sufficient.

Except in promises to exchange sums of money, the law does not require the consideration to be adequate.

Consideration is the thing given or done, or to be given or done, by one person in exchange for a promise by another person to give or do something. It does not mean that one party must receive a benefit (although this was true in the early contract of debt), but that the other abandons, or promises to abandon, a legal right, either as an inducement for, or because induced by, the first's promise of a legal right. The legal right may be a right in rem, or a right in personam, antecedent or remedial; it may be a right which arises without a contract, or one that arises by virtue of a quasi contract, or another contract; it may be a right of property, or a right of liberty; but, whatever it may be, if it is of sufficient worth to be protected by the law from violation by torts, it is of sufficient worth to be recognized and protected by the law from violation by breach of contracts. A promise by one person to give up a legal right, without a reciprocal promise by another, will not be enforced because one man's rights ought not to be taken away from him and given to another unless he receives something in return. A man ought not to be made poor that another may be rich. So, though a man may make a gift of any of his rights, by his own act, the law will not compel him to carry out a promise to make a gift. His promise of a legal right must be bought by a legal right, or the promise thereof, by another. But there are other, as fatal, objections to enforcing gratuitous undertakings. The consequences of enforcing them would be mischievous to society. Promises, unthinkingly uttered, as well as those never made, would be enforced. Voluntary undertakings would be preferred to just debts. The faithful discharge of their duties, by executors, would be well nigh impossible. So that the common law has wisely insisted, in the case of assumpsits as well as in the case of covenants and debts, upon some better evidence than a bare promise and, as a result, we have the modern doctrine of consideration, the righteous union of the old quid pro quo of debt and the detriment, or damage, of assumpsit.

But so long as there is a legal right given or promised for a promise of a legal right, the law does not attempt to determine whether value is being given for value, i. e. quid pro quo. The adequacy of the consideration is not inquired into. It is better to allow freedom of contract to individuals, and permit their appetites to measure the price that shall be given for legal rights desired. Hence, though the thing to be done by one be never so small, as the mere surrender of the possession of a chattel, or the taking a trip abroad, for another's promise to improve the chattel, or to pay all the expenses of the trip, as there is the relinquishment of a legal right, the consideration is sufficient.

The case of exchange of sums of money may, at first, seem an exception to this rule but looked at more closely it is seen to be in direct harmony with it; for, in the nature of the case, there is no opportunity for the parties to measure the value of legal tender. Let A promise to pay B $1,000 for B's promise to pay A $2,000. A pays B $1,000 and B pays A $1,000. Then A sues B to recover the rest of the $2,000. What legal right has he given or promised to give for it? So, a promise of an act that a person may or may not perform stands in no better light.

An anomolous form of consideration is that of natural love and affection between those related by blood or marriage. If love and affection and that of the promisor could be a consideration, it would be a marked exception to the general doctrine of consideration, for the other party would neither give, nor promise to give, a legal right for the first party's promise. It is enough to say that today the doctrine is obsolete. It is of interest only as an instance of the early common law doctrine of uses. At the common law it was sufficient to sustain a covenant to stand seized.

While the doctrines of assumpsit now occupy almost all the field of contracts, there is a small corner still left in the possession of covenant. This necessitates a division of contracts into simple and specialty, the former always requiring a consideration and the latter, instead, requiring a seal. But the doctrine of consideration is so useful and overshadowing that it continues to encroach upon the doctrine of the seal, so that now the seal is coming to have little

significance, and what little it has rests, not upon the original ground of evidence but, that it implies a consideration.

The doctrine of consideration is sometimes made to include legality, definiteness, intent to create legal relations and everything necessary to enforcibility, except parties and assent. Consideration consists of a legal right. If the thing given or done, or to be given or done, is illegal or unenforcible, for other reason, in a sense it is not a legal right and, therefore, cannot amount to a sufficient consideration; but there is another reason why such agreements are not enforcible, and it conduces to clearness, not to extend consideration to include these matters.

The modern doctrines of consideration do not extend to quasi contracts.

§ 136. In a unilateral agreement, the consideration must be a legal right given by one for a promise of a legal right by another.

In a unilateral agreement, the consideration is always executed. The thing given or done constitutes, at the same time, both the acceptance of an offer and the consideration for the promise. The promisee sustains an injury or detriment because of his giving up a legal right and, as this is induced by the promise of the other party, he is entitled to the fulfillment of that promise.

A thing given or done in the past, even though on request or in performance of a legal duty, though under such circumstances as to lay the foundation for a quasi contract, is not sufficient consideration for a subsequent promise, for the act is not induced by the promise; but if various parties sign a subscription list, a subsequent act in reliance thereupon by those for whose benefit the subscriptions are given is induced by the promises, for they continue down to the time of the act. The doing of what one is already legally obliged to do, whether a duty imposed by law or an obligation of contract, cannot amount to a consideration for a new promise, for no legal right is given up. The legal right tendered for a consideration has already been sold, and cannot be used again though still in the promisee's

possession. Thus, payment of a part of a debt due for a promise to forego the balance, or to extend time, or the completing of a contract for a promise of extra compensation, or apprehending a criminal to secure a reward, when it is one's duty to do that act, does not constitute any consideration for a promise. It is the same thing as though no act had been done. There can be no detriment to one in paying half the sum he at any time may be compelled to pay. A promise to pay a debt barred by the statute of limitations, or by a discharge in bankruptcy, or a ratification of a voidable contract, or a waiver of demand and notice, is not an exception to this rule, for there is no legal right given up for the promise in any of these cases and the question of consideration is not involved. The promises merely amount to a waiver of a bar or impediment created by law for the benefit of individuals. No new obligation is created. But deeds, bills of sale, delivery of any corporeal chattel, or the evidences of incorporeal chattels, marriage, work and services, the relinquishment of any personal right, compromises of valid claims, or claims honestly or reasonably believed to be valid, forbearance to sue for a definite time, or the giving up of any other legal right, is a sufficient consideration for a promise.

ILLUSTRATIONS.

(1) In consideration of N's promise to pay one cent, and the love and affection S bore his deceased wife, and the fact that she had expressed it as her desire in an inoperative will, S agrees to pay N $500. Is there sufficient consideration for his promise? No. First, one cent is not sufficient consideration, for it is a case of exchange of sums of money. Second, all the other things are past, and natural love and affection would be no legal right even if not in the past.[290]

(2) D requests P to give him the next avoidance of a church, and promises to pay one hundred pounds therefor, and P deeds it. Is there sufficient consideration? Yes. The act may be done at any time if the offer still continues. Past consideration does not apply to such a case, but it would apply if the deed had been given first and the promise thereafter.[291]

(3) D sells a horse to P for thirty pounds. Afterwards D expressly warrants the horse sound, etc. There is no consideration for the war-

[290] Schnell v. Nell, 17 Ind. 29.

[291] Riggs v. Bullingham, Cro. Eliz. 715.

ranty. The promise must be coextensive with the consideration. A past consideration will support no promise. The warranty is gratuitous.[292]

(4) P buys land, agreeing to pay off a certain mortgage on the premises, to D. P, as a clairvoyant, gives test sittings to D and subsequently D agrees to give the amount of the mortgage to P, providing he dies within the time prophesied by P. Is there a sufficient consideration? No. So far as appears, there is no debt to P, prior to the making of the promise. A mere favor cannot be turned into a consideration.[293]

(5) W renders medical service for a pauper at the request of her son who is caring for her under an agreement with T, an overseer of the parish. After the cure, T promises to pay this bill. Is there sufficient consideration for T's promise? If the son can be regarded as the agent of T there is, for then T has ratified the act of his agent, and the son's promise is his promise; otherwise, the only liability is in quasi contract, for the act is not induced by the promise.[294]

(6) At the common law, L furnishes goods to S, a married woman, and after the death of her husband, S promises to pay for the same. There is no consideration here as the former debt is the husband's, so that this promise is a mere gratuitous promise to pay the husband's debt.[295]

(7) L, twenty-five years of age, on returning from a sea voyage, is taken sick and is boarded and nursed by N. After all the expenses are incurred, W, L's father, promises to pay N therefor. Is there sufficient consideration? The act is not given for the promise. This case is to be distinguished from a case where there is a legal obligation which cannot be enforced because of impediments created by law, but which a party may waive. Of course there is a quasi contract against the son.[296]

(8) C signs a subscription paper wherein, in consideration of one dollar (not paid), and the agreement of the others, he promises to pay $5,500 to P, on condition that $45,000 be subscribed, which is done. P neither acts on this promise, in raising the $45,000, nor does anything since in reliance on the promise. C has paid $2,000, but this is applied on an old debt. There is no consideration for P's promise unless it can be shown that it is induced by other subscriptions. If the promise is to the church, there is no legal right given for it. Even if one subscription is for another, England, Massachusetts, New York and some other courts, hold that P cannot sue on the contract because of lack of privity.[297]

[292] Roscorla v. Thomas, 3 Q. B. 234.

[293] Moore v. Elmer, 180 Mass. 15, 61 N. E. 259.

[294] Watson v. Turner, Bull. N. P. 129. See Atkins v. Hill, Cowp. 284.

[295] Littlefield v. Shee, 2 Barn. & Adol. 811.

[296] Mills v. Wyman, 20 Mass. (3 Pick.) 207.

[297] Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352.

(9) A owes B $209. B tells A that if he will pay $25 thereon B will wait a month and, if necessary, longer, for the balance. A pays the $25. There is no consideration for B's promise, as A has sustained no detriment, given up no legal right. The payment of the $25 is a legal right which already belongs to B.[298]

(10) F owes B over 2,200 pounds on a judgment obtained by B against F, and desiring time to pay it F pays 500 pounds, and promises to pay 300 pounds annually until the whole sum is fully paid, on B's promise not to take any further proceeding on the judgment. Is there a sufficient consideration for B's promise not to take any further proceeding? No. This is not one bargain but two, payment of a part and an agreement without consideration to give up the residue. In order to make the act a consideration for the promise to forgive, it must be something that the party is not already bound to do. Therefore, in this case, although F should make all the payments, B could sue to collect interest on the original judgment. But if, instead of paying money, F had given a horse or a note, it would have been sufficient consideration.[299]

(11) A procures a judgment against B for costs of 610 pounds. Through his attorney, B gives A a check for 609 pounds, in full satisfaction, one pound filing fee, and 33 pounds interest being omitted. Is B's satisfaction a sufficient consideration? In England it is held that it is, for it is not merely paying a part of a debt for a promise to forego the balance but doing a new act. This is on the ground that the drawing of the check is like giving a promissory note. There are no American cases, however, that hold this position.[300]

(12) L promises to open a cartway, for a promise by J and C to pay him $900, on a penalty of $250 for non-performance. After starting the work, L encounters unforeseen difficulties and C releases him from his covenant and promises to pay him by the day, if he will go on and complete the job. L goes on and does the work. Is there a sufficient consideration for C's second promise? On principle, there is no consideration, because L is already under legal obligation to do this piece of work, but some courts, including Massachusetts and New York, uphold the second agreement. Parties can by mutual agreement discharge an old contract and start negotiations all over again, but, before this contract is interpreted thus, it must be clear that there are two transactions, and not simply one. If the parties encounter some new and unforeseen difficulty, there is an equitable circumstance which makes it easy to split the facts up into two transactions and this position is the one taken by other courts.[301]

(13) K contracts to do grading for D but, in the course of the

[298] Warren v. Hodge, 121 Mass. 106.

[299] Foakes v. Beer, 9 App. Cas. 605.

[300] Bidder v. Bridges, 37 Ch. Div. 406.

[301] Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Munroe v. Perkins, 26 Mass. (9 Pick.) 298.

work, encounters frozen ground and other obstacles and refuses to go on with his contract. Thereupon D promises to pay up to the full extent of the cost of the work if K will go on and prosecute it and complete his contract. K promises to do this and does so. If K encounters, in the work, some new and unforeseen difficulty not in the contemplation of the parties when the contract was made, or if the other party causes work outside of the contract to be done, there would be a new act and, therefore, some consideration for the new promise, but where the promise is simply a repetition of subsisting promises there is no consideration.[302]

(14) J, an architect, is under contract with W to superintend the construction of a brewery. W hires another person to superintend his ice plant and, when J hears this, he says he will have nothing more to do with the brewery. W then offers him five per cent of the cost of the ice plant if he will resume work. J then fulfills the duties of superintendent. Is there a sufficient consideration for W's second promise? No. J has only done what he was already obliged to do. A promise extorted in this way is a nudum pactum and not a new contract.[303]

(15) The City of Boston offers a reward of $2,000 for the arrest and conviction of an incendiary, within a specified time. P, a night watchman, detects and convicts an incendiary within the time, but it is his duty as a night watchman to do this. He has sustained no detriment because of the promise of reward and, therefore, is not entitled to the same.[304]

(16) A offers a reward of fifty pounds to any one who will give information which shall lead to the conviction of a burglar. A constable of the district gives the information. Is he entitled to the reward? Not if the act is within his duty, for then it is without consideration and against public policy, but, if the officer does something outside of his duty, he gives up a legal right and this amounts to a sufficient consideration.[305]

(17) A is the guardian of B but, when about twelve years old, B runs away and lives with an uncle, until A promises him that, if he will return, A will not charge him anything for board and will send him to school without charge. Is there sufficient consideration for the guardian's promise? No. The ward is legally bound to stay with his guardian, so that his act of returning is no detriment, and A can sue to recover the value of board and schooling.[306]

(18) A is surety for an infant, B, to another, for money borrowed by B, and A pays the debt. After B becomes of age he promises again to pay it to A. Is there a consideration for his promise? It is not a

[302] King v. Duluth, M. & N. R. Co., 61 Minn. 482, 63 N. W. 1105.

[303] Lingenfelder v. Wainwright Brew. Co., 103 Mo. 578, 15 S. W. 844.

[304] Pool v. City of Boston, 59 Mass. (5 Cush.) 219.

[305] England v. Davidson, 11 Adol. & E. 856.

[306] Keith v. Miles, 39 Miss. (10 George) 442.

case of consideration but of obligation implied by law. The promise after infancy has ceased amounts merely to a waiver of the defense of infancy. At the present time this case is settled by the doctrines of quasi contract.[307]

(19) On the eve of bankruptcy, F buys goods of T to the amount of 126 pounds, on credit, F accepting a bill drawn on him. After becoming a bankrupt, but before receiving a certificate of discharge, F promises, in a note, to pay sixty-seven pounds in full satisfaction of the debt if T will accept it and give up the acceptance. T gives up the acceptance thus relinquishing all chances of a dividend under the commission. Is there sufficient consideration for F's promise? Yes, so far as T is concerned, as he has given up a legal right, but F has promised to do nothing he is not already obliged to do as he is not yet discharged in bankruptcy.[308]

(20) Porter Bros, are insolvent and assign all their property to H, and H promises, by notes, to pay all the different creditors, including G, forty-five per cent of their debts and accepts an assignment of his demand from each. Thereafter, Porter Bros. promise G to pay the balance of his claim. The note of H, a third person, taken on giving up the entire claim, extinguishes the same. It is a different case from a discharge in bankruptcy, for there the debt is not extinguished by the discharge.[309]

(21) A owes B a certain amount on a promissory note. A goes through bankruptcy but, after his discharge, again promises to pay the note. The original note is still a legal obligation and may be declared on as soon as there is a waiver of the bar created by the discharge. There is no consideration for the new promise but none is necessary as it amounts to a waiver.[310]

(22) An indorser of a promissory note is not given notice of nonpayment and no demand is made on the note, but after the note is due he writes on the note, "Waive demand and notice." Is he liable? Yes. This is like the case of debts of infants and debts barred by statute of limitations and bankruptcy. It is a valid legal obligation which can be sued on, since the defence of no demand and notice is waived.[311]

(23) A, at the time of entering into a contract, agrees, in writing, to waive the statute of limitations. Is the agreement binding? Yes. Where no principle of public policy is violated, parties are at liberty to forego the protection of the law. The statute of limitations is for the benefit of individuals and not to accomplish general objects of policy and, therefore, may be waived.[312]

[307] See Edmond's Case, 3 Leon. 164.

[308] Trueman v. Fenton, Cowp. 544.

[309] Grant v. Porter, 63 N. H. 229.

[310] Dusenbury v. Hoyt, 53 N. Y. 521. See, also, Way v. Sperry, 60 Mass. (6 Cush.) 238.

[311] Rindge v. Kimball, 124 Mass. 209.

[312] State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177. See also, Ilsley v. Jewett, 44 Mass. (3 Metc.) 439; Armstrong v. Levan, 109 Pa. 177, 1 Atl. 204.

(24) D owes P a debt which is barred by the statute of limitations. Thereafter, he promises to pay the debt in intallments of ten dollars per month and, as a part of the first installment, pays five dollars. Is the statute completely waived so that P can sue at once for the whole debt? No. The debtor is entitled to the defense of the statute except in so far as he waives it.[313]

(25) M guarantees a college $10,000 if it will locate on a certain tract of land. S subscribes $5,000 to reimburse M for his guaranty, when the college is located on a certain part of said tract. The college is located on a different part of the tract. M informs S of the discrepancy between the subscription and the guaranty, and S says he will pay the amount anyway. M then pays the full $10,000. Is S liable? No. He is not liable on the original promise, even if valid, as its terms have not been fulfilled, and there is no consideration for the subsequent promise as M incurs no detriment for it. There appears to be no consideration for even the original promise to pay $5,000 as the consideration for the guaranty of $10,000 moves from the college so that S's subscription is a promise to make a gift on condition.[314]

(26) S buys of H a mare at sheriff's sale but leaves the animal temporarily with H. H sells the same to F. S demands the animal of F who gives her up on S's promise to return her if H is not convicted of larceny in selling her to F. F is keeping the animal wrongfully, so he gives up no legal right, and the conviction or acquittal of F has no legal effect and, hence, there is no consideration for S's promise. In addition, the contract never takes effect because of failure of the condition precedent that H's title would be determined by the prosecution.[315]

(27) A gives B a letter, which he has in his possesslon, and which shows that a certain ancestor of B is an alien, on B's promise to pay him $1,000. Is this act sufficient consideration? Yes. This is a case of an act for a promise, a gift on mutual consideration.[316]

(28) A lets B have two boilers to weigh for B's promise to return them in good condition. Is A's act sufficient consideration? Yes. Giving up the boilers is a detriment to A. If the suit had been in debt, in order to have a consideration A would have to show a benefit conferred on B, but in assumpsit a detriment to A is sufficient.[317]

(29) A surrenders to B a promise of guaranty, by C to A, of certain bills of L, on B's promise to see certain bills of L paid. Is this consideration sufficient? Yes. The surrender of the paper is the giving up of a legal right and, therefore, sufficient, although if the former guaranty is valid it makes the consideration more valuable.[318]

[313] Gillingham v. Brown, 178 Mass. 417, 60 N. E. 122.

[314] Schuler v. Myton, 48 Kan. 282, 29 Pac. 163.

[315] Fink v. Smith, 170 Pa. 124, 32 Atl. 566.

[316] Wilkinson v. Oliveira, 1 Bing. N. C. 490.

[317] Bainbridge v. Firmstone, 8 Adol. & E. 743.

[318] Haigh v. Brooks, 10 Adol. & E. 309, 323.

(30) H is arrested and telegraphs A to send $400 to J, his attorney. A sends the money to J who, upon receipt of the same, recognizes as surety and obtains H's release. H is insane. There is no contract here between A and J, but there is a loan to H. This is not void because of H's insanity, but is a valid transaction so far as A is concerned, as he cannot plead another party's insanity. Therefore, A cannot recover the money from J who has entered into another valid contract with H. A promise of H to pay A must be inferred. If there is no promise, the liability is quasi contractual.[319]

(31) A, after the death of her husband, tells one of his creditors that if he will prove her husband owed him twenty pounds she will pay it. The creditor sues on this offer, without proving the debt. It was held in the early English cases that the detriment of bringing suit is a sufficient consideration and proof, but this is clearly wrong as one can never sue until he has a cause of action which, in a contract, presupposes a consideration and breach of contract.[320]

(32) A claims that B owes him a debt. B denies this but promises to pay it if A will make oath to it. A makes oath. Is this a consideration? Yes. The promise is to pay in return for the oath, making which is a detriment to A. It would be different if B simply said "You don't dare swear to it." Perjury would be a detriment, but would make the contract illegal, so that the perjurer could not enforce it.[321]

(33) C tells his nephew, D, that if he will take a trip to Europe he will repay him his expenses. D takes the trip. Is this a consideration for C's promise? Yes. It is a detriment to D. This case is different from one where a promise is made to make a present. That the trip is a benefit is nothing to the purpose, as D has a legal right to spend his money in some other way.[322]

(34) Two men are bound for a debt of a third person, so that both are liable to pay it. A says to B, "Pay all the debt and I will pay you my share." B pays all the debt. Is there a consideration for A's promise? Yes. B sustains a detriment which he is not bound to sustain because of the obligation of contribution.[323]

(35) A gives an accommodation note to B who has it discounted at a bank. B leaves it unpaid at maturity. C now promises, in another note, to pay A the amount of the first, if A will furnish the money to take up the first. A furnishes the money. Is there a consideration for C's note? Yes. In furnishing the money, A gives up a legal right, the right to wait a while before paying the note. When a third person makes a promise to one already bound to do a thing, it is easier to find a consideration than when the other party to the contract makes it.[324]

[319] Atwell v. Jenkins, 163 Mass. 362, 40 N. E. 178.

[320] Traver v. —. 1 Sid. 57.

[321] Brooks v. Ball, 18 Johns. (N. Y.) 337.

[322] Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464.

[323] Bagge v. Slade, 3 Bulst. 162.

[324] Abbott v. Doane, 163 Mass. 433, 40 N. E. 197.

(36) A promises to pay B $5,000 when B is twenty-one years old if he will refrain from drinking liquor and using tobacco until that time. B refrains. Is this a sufficient consideration? Yes. B has a legal right to drink liquor and use tobacco. This he gives up for A's promise, and that is sufficient. It is sufficient that he restricts his lawful freedom of action for the other's promise.[325]

(37) A and B are divorced. A, the husband, promises to pay B, the wife, six pounds per month, so long as she conducts herself with sobriety and in a respectful, orderly and virtuous manner. If the wife either refrains from these things or promises to refrain, is there consideration for A's promise? Yes. She has a legal right to get drunk or consort with people of bad character, and a promise to surrender this liberty and to conduct herself in the manner desired by A is sufficient consideration.[326]

(38) B prosecutes a writ of attachment against R and, in consideration of his forbearance to prosecute the writ further, R promises him fifty pounds. Is this forbearance a sufficient consideration? The loss of the writ and delay of suit are losses of legal rights and are sufficient consideration for the promise.[327]

(39) A works for B, B having advanced A's railway fare from his home to the woods. There is a dispute as to who is to pay this and A, finally, gives a receipt in full for the money due him for work after deducting transportation charges. Is there a consideration for the receipt? Yes. There is a dispute, therefore B gives up a legal right.[328]

(40) D's ship runs into and damages L's ship, and L detains D's ship and sues for the amount of the damage. D promises that if L will release the ship and discontinue the suit he will pay the damages not to exceed 180 pounds. L releases the ship and discontinues the suit. Whether L has a legal right to recover is an uncertain question. This being so, D gives up a legal right, for the compromise of a doubtful claim is such.[329]

(41) A imprisons two joint debtors, W and V. Of his own act, he releases W, and B then promises to pay the joint debt if A will release V. A release of one joint debtor is a release of all. Therefore, he has no legal right to detain V, after the discharge of W, and there is no consideration for B's promise.[330]

(42) S has D imprisoned in a suit against him, and M promises to pay S the amount of the debt and costs, if S will discharge D from custody. S discharges D. Is this a sufficient consideration? Yes, unless

[325] Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256.

[326] Dunton v. Dunton, 18 Vict. Law R. 114.

[327] Lloyd v. Lee, Hob. 216, note.

[328] Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664.

[329] Longridge v. Dorville, 5 Barn. & Ald. 117.

[330] Herring v. Dorell, 8 Dowl. 604.

the arrest is only colorable; for if S has a legal right to keep D in prison, giving it up is a sufficient consideration.[331]

(43) Commissioners do certain work on a street and assess the cost on the owners of adjoining houses. A is agent for the owner of one of the houses, and he is notified, as though owner, to pay his proportion. He attends the meeting and says he is not the owner, but is told that if he does not pay he will be sued, the commissioners thinking that they can hold him liable, but A always claiming he is not liable. A then gives promissory notes promising to pay. Is there consideration for his promise? Yes. It is the compromise of a doubtful claim. The detriment to the party consenting to a compromise, arising from the alteration in his position is the consideration. Here, it consists in postponing his action, by taking the notes.[332]

(44) A, claiming that money is due him from the Government of Honduras and others, is about to take legal proceedings when B promises to deliver certain securities if he will forbear. A forbears. Forbearance to sue is a sufficient consideration for a promise to compromise a disputed claim, as a legal right is given up when one is justified in believing he has a chance of success.[333]

§ 137. In a bilateral agreement the consideration must be a promise of a legal right by one, for a promise of a legal right by another.

The consideration in both unilateral and bilateral agreements must really be of the same nature. The only difference is that in a unilateral it is executed, while in a bilateral it is executory. In a bilateral agreement the consideration is not a legal right actually given up, not a detriment sustained, not a thing given or done, but only the promise thereof. But where a promise of one legal right is obtained by a promise of another legal right, the party who is ready to carry out his promise is as much entitled to the fulfillment of the other promise as though he had actually given up a legal right. In a bilateral contract either party may sue, while in a unilateral only the promisee can sue, but the party suing must always furnish a consideration.

ILLUSTRATIONS.

(1) A offers to supply B with any quantity of iron he may order, during a certain period, at specified prices. B accepts the tender.

[331] Smith v. Monteith, 13 Mees. & W. 427.

[332] Cook v. Wright, 1 Best & S. 559.

[333] Callisher v. Bischoffsheim, L. R. 5 Q. B. 449.

Several orders are given by B and supplied. Then A refuses to supply any more. Is the acceptance of the tender a sufficient consideration for A's offer? The mere acceptance of the tender amounts to nothing because B does not promise to give up any legal right. It is an illusory promise. The agreement is void for lack of mutuality.[334]

(2) A man promises to marry a woman, in exchange for her promise to marry him, but she refuses to marry him. The man's promise is a sufficient consideration for the woman's. Each has promised to give up a legal right, the right to a single life, and this is sufficient.[335]

(3) A and B mutually agree to marry each other. A is an infant of fifteen. Is there consideration for B's promise? Yes. If the contract was void because of the infancy of one of the parties, there would be no consideration but, as it is only voidable, the consideration is sufficient.[336]

(4) J, husband of E, just before his death expresses his desire that E shall have their dwelling house for her life, and J's executors, in order to carry out his wish, promise to convey the premises to E, on her promise to pay to the executors one pound yearly, towards the ground rent, and to keep up the repairs. Is there sufficient consideration for the executors' promise? Yes. The consideration is a promise to do an act which involves giving up one of E's legal rights. This is not a case of a gift with burdens, as where one promises to pay rent, already due on the thing given, or to make repairs, because of a covenant to keep up repairs, attaching to the thing given.[337]

(5) Certain manufacturers sign a paper, wherein each promises to pay $500 and such further sums as a committee may demand, not to exceed $2,000, to be used by the committee in defending suits. The committee signs the paper along with M and A, and it undertakes the defense of some suits. Is there a sufficient consideration for the promises of M and A? Yes. Either the act of defending the suits is a consideration for the entire promise or signing the paper is a promise to defend, which is a consideration for the promises to make payments. When a promise is made inviting conduct, and conduct follows, it is rare that inquiry will be made as to whether the conduct is induced by the promise.[338]

(6) H owes B a note and P is surety on the note. H asks for an extension for one year, agreeing to pay interest, and B grants the extension. Is there consideration for B's promise? Yes. Each party has promised to give up a legal right, one to sue, the other to pay at once (which means he must pay interest another year) and, therefore, as the

[334] Great Northern R. Co. v. Witham, L. R. 9 C. P. 16. See, also, Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240.

[335] Harrison v. Cage, 5 Mod. 411.

[336] Holt v. Ward Clarencieux, 2 Strange, 937.

[337] Thomas v. Thomas, 2 Q. B. 851.

[338] Martin v. Meles, 179 Mass. 114, 60 N. E. 397.

obligation of the surety is changed without his consent, he is discharged.[339]

(7) A owes B an amount on a promissory note. When it is due A asks an extension for a week, and agrees to pay it within a week if extended, and B grants the extension. There is no consideration for B's promise as it is a promise to extend a note for nothing. A does not promise to give up any legal right. This case is to be distinguished from the preceding case.[340]

(8) A, a shipowner, promises B to deliver certain coal to C, on B's promise to pay the freight. Then A promises to deliver the coal to C, on the latter's promise to unload it at the rate of forty-nine tons a day. Assuming that A has some legal right to refuse to let C have the coal, is there any consideration for this second promise? Yes. This is a good bilateral agreement. A promises to give up a legal right (e. g., to hold for demurrage), for B's promise to do what he is not obliged to do, unload forty-nine tons a day.[341]

(9) M sells to S, by meets and bounds, a tract of land containing 521 acres, for $8,000. Later, the parties differing as to the quantity of the land, agree to have it surveyed, and M agrees to pay sixteen dollars and fifty cents for every acre under 521, for S's promise to pay the same amount for every acre over 521. This agreement is bilateral and, like a wager, each party promises to give up a legal right to money on the happening or not happening of an ulterior event, but it is not against public policy because not a mere bet.[342]

(10) A makes a void assumpsit to B. C promises to pay B ten pounds if he will promise to relinquish A. There is no consideration for C's promise. B has no legal right against A. Therefore, he relinquishes nothing.[343]

(11) A has B arrested for a debt and, on B's promise to pay the debt and costs, A promises to release her. Is there sufficient consideration? Yes, if the arrest is legal, as A has a legal right to keep B in jail till the debt is paid.[344]

(12) At the time of his death B is indebted to J for fifty-eight pounds for goods bought. After his death his wife, N, on J's promise to forbear suing for the amount, promises to pay the debt within a reasonable time. Is there sufficient consideration? Yes, if J really has some one in mind to sue, as a personal representative, his promise to forbear is a sufficient consideration; otherwise there is no consideration. He must change his conduct because of the promise.[345]

[339] Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061.

[340] Austin Real Estate & Abstract Co. v. Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430.

[341] Scotson v. Pegg, 6 Hurl. & N. 295 (doctrine of benefits incorrect).

[342] Seward v. Mitchell, 41 Tenn. (1 Cold.) 87.

[343] Barnard v. Simons, 1 Rolle Abr. 26, pl. 39.

[344] Atkinson v. Settree, Willes, 482.

[345] Jones v. Ashburnham, 4 East, 455.

(13) G, being a promoter of a company which purchases property in New Zealand from him on certain representations made by him, is charged with misrepresentations at a shareholders' meeting and, fearing that proceedings may be taken against him, executes a guaranty of a certain dividend to the shareholders for ninety years. No proceedings are taken against him. Is there a consideration? No. If the contract is bilateral, there is no promise to forbear a disputed claim believed to be valid; if unilateral, no forbearance because of the guaranty. It is merely a sop to the angry shareholders. It is not right to turn an expectation into a contract.[346]

(14) A owes B a debt and, on B's promise to forbear suit for such time as he shall elect, C, A's wife, indorses a note, which A signs as maker, as surety for the debt. The note is payable on demand. B forbears suing for two years. Is there a sufficient consideration? No. This is a bilateral agreement and B has promised to give up no right and, therefore, there is no consideration for the note. If C had made a promise to become liable as surety on B's forbearance to sue, and B had forborne there would be consideration, or, if B had promised to forbear for a fixed or reasonable time, there would be a consideration.[347]

(15) C owes R and T a sum of money. In consideration of the promise of R and T to accept a composition of fourteen shillings on the pound, C promises to pay the same. The early cases held that this is merely an accord and, therefore, not a consideration, that, to be a consideration, accord must be executed by satisfaction; but the true ground is whether in an accord or in a satisfaction some new legal right is given up or promised. If C actually pays the amount of the composition by giving R and T some new right, he does something he is not legally obliged to do, and that is sufficient consideration for the promise on the other side. So, if the accord is the promise of a new legal right, there is no reason why it should not be binding.[348]

(16) C institutes, against F, an action in trover and an action in trespass, but agrees to settle them for a certain sum to be paid by F, and another sum to be paid by S, on F's promise to pay the first sum and to guarantee the payment of the second. There is sufficient consideration for F's promise. C's is a promise to give up very valuable legal rights (to proceed further with the suits assuming that they are good causes of action).[349]

(17) B leases to A certain premises for a rent to be agreed upon by two valuers, or their appointee. After B's death and before the valuers agree upon the rent, A promises N, B's administrator, to pay him seventy pounds, in exchange for N's promise not to ask the valuers to determine the rent. These promises are sufficient consideration. N has prom-

[346] Miles v. New Zealand Alford Estate Co., 32 Ch. Div. 266.

[347] Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330.

[348] Lynn v. Bruce, 2 H. Bl. 317.

[349] Crowther v. Farrer, 15 Q. B. 677.

ised to give up a legal right, that of suing on the debt, which he cannot now do without making himself liable to an action.[350]

(18) After twelve years of illicit cohabitation, in consideration that she will henceforth lead a virtuous life, A promises B ten pounds quarterly. Afterwards in consideration of B's promise to give up the allowance, A promises to give her what it is reasonably worth. The first agreement is void, either on the ground of illegality or because no legal right is given up to constitute a consideration and, being void, it cannot be a consideration for a new agreement.[351]

[350] Nash v. Armstrong, 10 C. B. (N. S.) 259.

[351] Binnington v. Wallis, 4 Barn. & Ald. 650. Contra, Barnes v. Hedley, 2 Taunt. 184; Lee v. Muggeridge, 5 Taunt. 36.

CHAPTER VII.

LEGALITY OF OBJECT.

I. Prohibited by law, § § 138-145
   - A. Crimes, § 139
   - B. Torts, § 140
   - C. Professions and business unlicensed, § 141
   - D. Work and labor on Sunday, § 142
   - E. Wagers, § 143
   - F. Lotteries, § 144
   - G. Usury, § 145

II. Contrary to the policy of the law, § § 138, 146-154
   - A. Dealings affecting the state, § § 146-147
     1. In its external relations, § 146
     2. In its internal relations, § § 147-148
        - a. Public service, § 147
        - b. Public justice, § 148
   - B. Dealings affecting society as a whole, § § 149-154
     1. Morals, § § 149-150
        - a. Illicit cohabitation, § 149
        - b. Marriage relation, § 150
     2. Commerce, § § 151-153
        - a. Negligence of common carrier, § 151
        - b. Monopolies, § 152
        - c. Restraint of trade, § 153
     3. Public health and safety, § 154

§ **138.** In order to be enforcible the object to be accomplished by the agreement must be lawful. The object may be unlawful, either because prohibited by law or because contrary to the policy of the law.

A lawful part of a divisible agreement is enforcible if it constitutes a complete agreement and can be separated from all illegality.

An agreement is unlawful if its immediate object is unlawful, or if the ulterior design of both parties

is unlawful, though the immediate object is lawful.

The privilege of making contracts is a right which should be invaded only when the rights of society as a whole become paramount to the right of the individual, when the individual right should give way for the public good.

An object may be unlawful because expressly forbidden or because contrary to the policy of the law, but where there is an express prohibition it is useless to discuss the policy of the law. If any part of an entire or indivisible agreement is illegal, the whole agreement should be void, but if the agreement is divisible so that all the elements of a contract exist in a part, though another part may be illegal, the legal should be enforced, for, if it is not contrary to law to enforce an agreement standing alone, it is no more against the law when standing beside another.

If the immediate object of an agreement is unlawful, neither party should be allowed to sue on it, nor should there be any recovery in quasi contract for benefits conferred pursuant thereto.

If the immediate object of the agreement is not unlawful, then the intention of the parties becomes of consequence and, if the intention of both parties in making it is unlawful, neither party should have any remedial rights; but if the intention of only one party is unlawful, though the other party may have the bare knowledge of this fact, if he in no way participates in the unlawful design, the latter should be allowed to treat it as a voidable contract and either sue for breach or avoid it and sue in quasi contract. In an agreement for illicit cohabitation, the immediate object is unlawful and it is against the policy of the law to have anything to do with it. In an agreement for marriage the immediate object is lawful, but if both parties are already married, or one is married and the other knows that fact, the unlawful intention of the parties makes the object unlawful. Now, if only one party is married, and the other does not know this fact, but supposes they are both single, the object is unlawful as to only one party and the innocent party is entitled to redress. The rule which protects an innocent

party where the immediate object is not unlawful also rightly protects an innocent agent of a party whose intention is unlawful.

If a party is induced to enter an illegal contract by fraud or coercion, or, in any event, if the contract is unperformed, he is allowed to rescind the contract on the original ground of fraud or coercion, or on the ground that he is allowed a chance to repent, for under such conditions the reason for non-enforcement of agreements whose object is illegal does not apply.

If a statute is only directory, it does not make the doing of a thing unlawful. The agreement is enforcible, but some penalty may have to be paid.

§ 139. Any agreement, the object of which is the commission of a crime, is unlawful.

The reason why such agreement is unlawful is because its object is prohibited by law. It makes no difference whether the crime is forbidden by common law or statute. Any agreement whose object is the commission of a crime is illegal. What cannot be done directly cannot be done indirectly. If, however, the purpose of a statute is not to prohibit certain conduct, but to make it expensive to parties (as where the penalties are recurrent), an agreement relating to that matter may not be forbidden or unenforcible. The law of crimes is now mostly a statutory matter, the common law of crimes having been embodied in statutory enactments. Agreements are seldom made to commit heinous crimes.

ILLUSTRATIONS.

(1) H sells and delivers tea to J for a certain price, knowing that J intends to smuggle tea into England, but H has nothing to do with the smuggling scheme. Can H recover the price? Yes. This contract is not about anything prohibited by law, but is a mere sale of tea. Had the bargain been that H was to be paid if J succeeded in landing the goods, or if H had undertaken to run goods into England it would have been an agreement to commit an offense against the laws of England, and illegal, and H could not then recover the price, not because the law would protect J but because it will not lend its aid to such a plaintiff.[352]

[352] Holman v. Johnson, Cowp. 341.

(2) G, of Massachusetts, sells in Massachusetts, to J, a Maine hotel keeper, intoxicating liquors for a certain price, G expecting and desiring that J will sell the same unlawfully in Maine and intending to facilitate his doing so. Is the agreement enforcible? No. As G intends a breach of the law of Maine the sale is illegal. The overt act of selling, otherwise too remote, is connected with the result, by the intent of the seller, but if G merely sells liquor to J, with an indifference as to where J sells it, the sale is not made illegal by the fact that G knows that J intends to sell it unlawfully.[353]

(3) O is arrested for a felony and, to get him released on bail, N signs his bond, and in exchange for N's promise to indemnify him against all liability, M also signs the bond. Is the contract of indemnity enforcible? Yes. The obligation assumed by sureties on a bail bond is not personal security and, therefore, the contract relieving from liability is not illegal.[354]

§ 140. Any agreement, the object of which is the commission of a tort, is unlawful.

The reason why this agreement is unlawful is because its object is prohibited by law. This prohibition extends not only to the more overt civil wrongs like assault and battery, trespass, conversion, slander and libel, malicious prosecution, false imprisonment and nuisance, but to negligence, conspiracy and frauds of every kind. Frauds on creditors and the general public are frequent instances. If a contract is procured by a tort it is voidable, but if an agreement is made to commit a tort it is void. In the first the tort affects the reality of consent, in the second the legality of the object.

ILLUSTRATIONS.

(1) A and B, who together own a majority of the stock in the "I" Company, promise to make C treasurer of the company at a fixed salary, in exchange for C's promise to buy part of their stock at par. Is the contract illegal? Yes. It is a fraud on the other shareholders. The defense of illegality is not allowed to protect A and B, but for the public good.[355]

(2) H is asked by a New York club to find for it a builder who can build a building cheaper than the New York builders and whom H can indorse in every way. H indorses W, who gets the contract and builds the building. At an early stage in the proceedings, W promises to pay H $250 as commission for his services. Can H collect? No. If the

[353] Graves v. Johnson, 156 Mass. 211, 30 N. E. 818.

[354] Maloney v. Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418.

[355] Guernsey v. Cook, 120 Mass. 501.

promise of W is given after the building contract, there is no consideration for it; if given before it is illegal because it would tend to give H a bias, and would be a fraud on the club.[356]

(3) S pays B a certain sum of money pursuant to an agreement to buy, at a premium, stock in a company being organized by them, the object being to induce the public to believe that there is a real market for the shares when there is none. B passes off, on S, his own shares, instead of buying in the market. Can S rescind the agreement and recover the money paid? No. The whole agreement is illegal, as its object is a wrong, if not a crime, an illegal act to be accomplished by illegal means. S, in suing for breach of contract, must show the whole contract, when the principle of in pari delicto applies, though otherwise, the contract would be voidable for fraud.[357]

(4) S, the son and creditor of R, in order to induce G, another creditor, to procure a settlement of creditors, promises to give G S's debt and a further sum of money in exchange for G's promise to sign the release of R and to procure the signatures of the other creditors. Can S sue to recover his share of the composition? No. Fraud taints the whole transaction. S does not act as a decoy duck himself but procures G to be the duck to draw other creditors into this arrangement.[358]

(5) K is induced to sign a composition deed, by promises of other creditors who have secretly been paid in full, by relatives of the debtor, G, with G's knowledge. Is the composition deed enforcible? No. The fact that the excess is not paid by the debtor does not divest the transaction of its fraudulent character as the agreement is between the creditors themselves as much as between the creditor and debtor.[359]

(6) G promises not to bid, at an auction, for the labor of the inmates of a house of correction, in exchange for S's promise to pay G $800 if he gets the contract. Is the agreement enforcible? No. This agreement is made for the purpose of preventing competition and is contrary to public policy and is fraudulent.[360]

(7) In exchange for B's promise to defend, at his cost, any suits for statements contained in his book, J promises to publish the same. The parties do not intend to publish libelous matter, but make the above agreement in case suits for libel are brought. Is this agreement enforcible? Yes. In order to be illegal the author and publisher must intend to publish a libel.[361]

(8) P buys of N certain bonds, being induced to purchase by the fraud of N's agent. The sale of the bonds is illegal because forbidden

[356] Holcomb v. Weaver, 136 Mass. 265.

[357] Scott v. Brown [1892] 2 Q. B. 724.

[358] Frost v. Gage, 85 Mass. (3 Allen) 560.

[359] Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674. Contra, Hanover Nat. Bank v. Blake, 142 N. Y. 404, 37 N. E. 519.

[360] Gibbs v. Smith, 115 Mass. 592.

[361] Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087.

by law. Can P rescind for fraud and recover the money paid? Yes. The right to be restored to his former position because of the tort is not taken away, because thereby a forbidden deed will be undone. This answer might be different, if P should know he was doing something forbidden.[362]

§ 141. Any agreement, the object of which is practicing certain professions or businesses without a license, or contrary to regulation, is unlawful.

Lawyers, physicians, teachers, peddlers and foreign corporations, are generally required to procure a license of some sort before pursuing their occupation or business. Sales of intoxicating liquors and sales by weights and measures are frequently prohibited excepting as licensed. A domestic corporation cannot make valid agreements in regard to matters in excess of its powers (ultra vires). If the purpose of the statute is to protect the public, it is prohibitory, and an agreement in violation of the statute is void; but, if the statute is merely directory, it does not invalidate the contract.

ILLUSTRATIONS.

(1) A performs work for B, as a broker, when he is not licensed as such. The language of the statute indicates that the legislature intends to protect the public rather than to raise a revenue. Can A recover for his work? No. If this statute has the intent indicated it is meant to prohibit the contract. A contract prohibited by statute is void.[363]

(2) A sells goods to B, by weight and measure, when his measure, scales and weights, are not sealed as required by statute. The statute makes such sale a misdemeanor and imposes a penalty and the intent is to prohibit the sales altogether. Can A recover? No. The contract is unenforcible, for the statute aims to prevent fraud and to protect the public.[364]

(3) A, by charter party, ships, by B's ship, a load of hay from France to England, to be bought and taken from the ship alongside. A orally orders B to deliver the hay at a particular wharf. A law of England forbids landing hay for the reason that France is declared an infested country, but the parties, as a matter of fact, do not know of this

[362] National Bank & Loan Co. v. Petrie, 189 U. S. 423.

[363] Cope v. Rowlands, 2 Mees. & W. 149.

[364] Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299.

law. Is the agreement enforcible? Yes. In order to avoid a contract which can be legally performed, it must be shown that there is an intention to break the law. This contract can be carried out without landing the hay and, therefore, is legal.[365]

(4) R agrees to act as agent for the U. S. Co., in writing insurance, and the company appoints him as its agent for Massachusetts for five years, for a percentage of commissions. R agrees not to engage in a like business for three years after quitting the company. The company has no certificate authorizing it to transact business in Massachusetts, it being thought that the business is not insurance and, therefore, the certificate not necessary. The company breaks its contract because of insolvency. Is it liable? Yes. It is the business of the company to procure the certificate and it cannot set up that fact to defeat B's recovery.[366]

(5) B, an officer of N, borrows money of it, pledging, as security, bonds which he holds as trustee. A statute provides that no official shall borrow money of a corporation for which he is acting. Is the contract enforcible by N? Yes. The statute is directory. Its purpose is to protect the corporation. The official is the one who is affected by the statute. As the bonds are in the hands of a bona fide purchaser, it is protected though B has no right to pledge them.[367]

(6) P promises to lay two drains for D, for a private sewer, for D's promise of compensation, the details of the contract being left to P. P uses some pipes not authorized by statute, and also works without a permit as required by the statute. Can P recover anything for services? Yes. The illegal acts do not enter into the promise or consideration. A contract is not necessarily illegal because carried out in an illegal way.[368]

§ 142. In most jurisdictions any agreement, the object of which is the doing of work and business on Sunday, except work of necessity and charity, is unlawful.

When the object of this agreement is prohibited it is by virtue of statute. In England and in some of the states of the Union, at one time, it was unlawful to make any agreement that was blasphemous in character. If a statute forbids only servile labor on Sunday, a valid contract may be agreed upon on Sunday, and if a statute forbids the making

[365] Waugh v. Morris, L. R. 8 Q. B. 202.

[366] Rosenbaum v. United States Credit System Co., 65 N. J. Law, 255, 48 Atl. 237.

[367] Bowditch v. New England Ins. Co., 141 Mass. 292, 4 N. E. 798.

[368] Fox v. Rogers, 171 Mass. 546, 50 N. E. 1041.

of contracts on Sunday, in order to fall within the prohibition, the contract must be completely closed on Sunday. Works of charity include acts of humanity, or benevolence, to relieve the distress of man or beast, or acts done in connection with religious worship. Works of necessity include acts done for the preservation of life, health, or property, when the acts cannot as well be done on another day.

ILLUSTRATIONS.

(1) A hires, and B lets, a hall to A for a week-day ball and two Sunday lectures against the Bible and Christ. Is the agreement enforcible by A? Not in England, as to the Sundays, for its object is unlawful by the Statutes of Victoria.[369]

(2) D hires of P on Sunday, a horse and carriage and, through his negligence, injures both. He gives a note in settlement. It is illegal by statute to do anything on Sunday except works of necessity and charity. Is the note enforcible? No. The hiring is illegal as it is not for necessity or charity and, therefore, the note given to settle an agreement that cannot be enforced is without consideration.[370]

(3) If a party renders services on Sunday, contrary to statute, can he recover in quasi contract? No. It is not like the case of benefits conferred on a contract, unenforcible because not satisfying the statute of frauds. There, it is merely unenforcible; here, it is illegal.[371]

§ 143. Any agreement, the object of which is a wager or an agreement to pay something on the happening or not happening of a specified but uncertain event, is now generally unlawful, except in the case of insurance.

In the absence of statute, there is a difference of opinion as to whether wagers are unlawful. Some courts hold them unlawful, on common-law grounds, because against public policy; others hold them unlawful where against public policy. The English courts enforced all wagers until they repented too late, and set to work to discourage them by evolving rules of public policy. But, whatever view is taken of wagers in general, those for commercial objects are upheld if there is some other reason for the agreement than a mere bet. Insurance is a form of wager contract, but it

[369] Cowan v. Milbourn, L. R. 2 Exch. 230.

[370] Tillock v. Webb, 56 Me. 100.

[371] Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020.

is justified by the requirement of what is called an insurable interest in the life or thing covered by insurance. Option agreements are not inherently vicious but, where such agreements do not contemplate an actual delivery of property but the payment of the difference between the contract price and the market price on the day set for performance, they are a mere wager on the rise and fall of the price, and condemned. Competition entered into for the purpose of obtaining a prize or premium offered by a third person to a winner, is not a wager.

Recovery of money deposited with a stakeholder can be maintained in quasi contract if he is notified by the depositor not to pay over the money deposited. The reasons for allowing such recovery is that the stakeholder is not in pari delicto and, in England, by statute, and, generally, by common law, wagers are non-enforcible and not illegal, that is, the immediate object is not unlawful.

ILLUSTRATIONS.

(1) H wagers 500 pounds against 500 pounds wagered by W that the earth is convex, proof of convexity of a canal or lake to be considered proof of convexity of the earth. The money is deposited with A; the referee finally decides that W wins but, before A pays the money over to W, H demands the return of the money deposited by him. Whether the wager is illegal or legal, a party can recover his own money from the stakeholder before it is paid over because the stakeholder is only agent for the depositer. If the wager is legal, his authority may be revoked. If the wager is illegal, he is not affected with the illegality. A statute which says no suit shall be brought to recover any sum of money deposited means a suit by the winner to recover the loser's money. This is really a proposition in quasi contract, rather than an illustration of a contract.[372]

(2) L and M buy stock for O, on credit, but as a real purchase, until O owes them $2,000. Can they collect? Yes. Purchase of stock, on credit, is not necessarily a gambling transaction. It may be bought on credit as well as sugar or flour.[373]

(3) Brokers in Chicago buy stock for brokers in Boston, on contracts for future delivery, but with no intent to have any actual delivery, but, by a series of off-setting contracts of sale, simply to make a payment of the difference in price. Can the Chicago brokers recover commission and losses incurred for the Boston brokers? No. There is no

[372] Hampden v. Walsh, 1 Q. B. Div. 189.

[373] Hopkins v. O'Kane, 169 Pa. 478, 32 Atl. 421. But see Thacker v. Hardy, 4 Q. B. Div. 685.

contractual or quasi contractual obligation, as the transactions are held, in Massachusetts, and the United States, to be illegal as well as void and, therefore, not only the original contracts but collateral contracts are tainted. To make a wagering contract, it is enough that both parties intend that one party shall not be bound to deliver or the other to accept. Delivery is not necessary if a party will stand ready to deliver.[374]

(4) W, through H, sells to B 5,000 bushels of wheat at $1.12, seller to have until the last of July to make delivery. Wheat goes up and H for W buys back the wheat from B for $1.26, and H gives B his note for the difference in the price. B intends to buy the wheat, but H claims the transaction is a gamble. Is the transaction illegal? No. If either of the parties contracts in good faith, he is entitled to the benefit of the contract.[375]

(5) N and F are captains of two hunting teams which arrange to hunt squirrels, the side that gets beat to pay for the suppers of both sides, each man paying for two suppers. W furnishes twenty-four suppers at the price of $18 on the order of N and F, who are to be responsible to him. W knows how the suppers are to be paid for. Can W recover from N and F? Yes. A wager is void only and not illegal and, therefore, W is not particeps criminis. His rights do not depend on the wager.[376]

(6) C promises, in writing, to pay F $902 if cotton shall rise to eight cents on or before the first of November, and, if not, $500. This instrument is given in part payment for a tract of land, the enhanced price to be paid if the value of the land is increased by its products. Is this a wager? No. The parties have an interest in the contingency.[377]

§ 144. Any agreement, the object of which is a lottery or a scheme for the distribution of property by chance among those who pay or agree to pay a valuable consideration for the chance of getting greater value, is unlawful.

A lottery is closely allied to a wager. It involves the element of procuring, through lot or chance, by the investment of one amount of money or its equivalent, a greater amount of money or value. If there is no consideration for the promise to distribute property by chance, it is a promise to make a gift and unenforcible on that ground; if there is a consideration for it, it is unenforcible because against public policy. The good morals of society require that no en-

[374] Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49.

[375] Pixley v. Boynton, 79 Ill. 351.

[376] Winchester v. Nutter, 52 N. H. 507.

[377] Ferguson v. Coleman, 3 Rich. Law (S. C.) 99.

couragement should be afforded to the acquisition of property other than by honest industry.

ILLUSTRATIONS.

(1) C purchases a farm and cuts it up into lots, and issues for each lot a ticket, which he sells for $330. The lots vary in value from $100 to $1,100, and each person who buys a ticket is to receive one lot. Is this a lottery? Yes. This case is to be distinguished from a case of partition by lot by tenants in common, for here the vitiating element is the chance of getting a very valuable lot for nothing.[378]

§ 145. Any agreement, the object of which is usury or knowingly taking or reserving, or promising to take or reserve, a greater sum for the use of money than lawful interest, is unlawful.

ILLUSTRATIONS.

(1) O borrows $100 of H and gives him, therefor, his note, secured by a bill of sale on certain cattle. The note draws six per cent interest per month and is, therefore, usurious. When the note falls due, O turns the cattle over to T, as security, for ten days, at the end of which time H takes them from T. Can O sue H for the conversion of the cattle? Yes. The original transaction is void for usury, and turning the cattle over to T is an extension of the original usurious security and not a payment; hence this transaction is void, and the cattle still belong to O.[379]

§ 146. Any agreement, the object of which is to enter into dealings with alien enemies, or which is promotive of hostile action against a friendly state, is unlawful.

An agreement of this sort is unlawful because its object is contrary to the policy of the law. Unless the hostile governments have waived their rights upon the breaking out of hostilities, a contract is either suspended during the time of hostilities or, if its object is inconsistent with suspension, dissolved. The individual right must yield to the greater rights of society as a whole.[380]

[378] Seidenbender v. Charles' Adm'rs, 4 Serg. & R. (Pa.) 151.

[379] Ormund v. Hobart, 36 Minn. 306, 31 N. W. 213. See Barnes v. Hedley, 2 Taunt. 184.

[380] Esposito v. Bowden, 7 El. & Bl. 793; De Wutz v. Hendricks, 2 Bing. 316; Hanauer v. Woodruff, 82 U. S. (15 Wall.) 439.

§ 147. Any agreement, the object of which is to promote dereliction of public duty, or to traffic in public offices, the emoluments of office, pensions, or public contracts, or to corrupt public officials, is unlawful.

A promise by a citizen to pay an official for doing what the duties of his office require him to do is unenforcible for two reasons. It is without consideration, and it is illegal. The public has an interest in the proper performance of their duties by public officials, and anything that would tend to make them less efficient is against public policy. The foundation of a republic is the virtue of its citizens. When that is undermined, the republic itself is endangered and liable to fall. The duties of public officers and the duties of the citizens are correlative, the one to be animated by a desire for the public good, the other by a desire for the integrity of every department of the government.

ILLUSTRATIONS.

(1) C promises to take charge of a claim of T against the United States, and to prosecute it before congress, as a lobbyist, for him, on T's promise to allow C twenty-five per cent of whatever congress may allow him. Is this agreemnt illegal? Yes. An agreement for purely professional services is valid, but when it includes personal solicitation it is pernicious and the law puts the seal of its disapproval upon it, and where the two are blended in one agreement the bad destroys the good. T, therefore not only has no lien on the money granted by congress, but he cannot even recover the agreed amount in a suit.[381]

(2) In exchange for M's promise to procure C's appointment as special counsel for the United States in defense of the "Faragut Prize Cases," and to assist in the defense, C promises to pay M one-half of all the fees which he shall receive as such special counsel. Is this agreement valid? No. It is contrary to public policy. Corruption in the public service is always the forerunner of despotism.[382]

(3) R, a railway construction company, has contracted with the G Railway to build for it a road by the nearest and most suitable route through Alabama, but deflects it to the town of Anniston, in consideration of W's promise to donate land and $30,000 in money. Is W's promise enforcible? No. Even if the contract involved only private parties, it would be contrary to law in binding an employe to rob his employer, but it is also contrary to public policy in that it attempts to induce a

[381] Trist v. Child, 88 U. S. (21 Wall.) 441.

[382] Meguire v. Corwine, 101 U. S. 108.

corporation, affected with a public interest, to disregard the interests of the public.[383]

(4) A is running for office and promises to give B a claim, which he holds against him, if B will work and use his influence for A's election. This B does. Is the promise enforcible? No. It is against public policy because it tends to the injury of the public service. A may sue and collect the claim.[384]

§ 148. Any agreement, the object of which is to compound a crime, or to oust the courts of jurisdiction, or, at the common law but not generally today, to encourage law suits, or to maintain a suit in consideration of a share of the proceeds, is unlawful.

The last two doctrines are known as champerty and maintenance. Champerty is maintenance, aggravated by an agreement to share in the proceeds of a suit. At the common law they were barred, or condemned, on the ground that they tend to degrade the remedies of the law, lead to corrupt practices and disturb the peace of society. No encouragement should be given to litigation by parties, introduced to enforce rights which the parties, in whom they are vested, are not disposed to enforce. Close social relations or charity may justify one in maintaining another's suit, but public policy forbids that one should maintain another's suit as a speculation. A bona fide purchase of a chose in action does not come within the condemnation of the rules against maintenance. An agreement to refer to arbitration, incidental and subsidiary matters in dispute, as a condition precedent to a right of action accruing, is valid, but if it goes so far as to completely oust the courts of jurisdiction and substitute a forum of the parties own making, it is void because tending to endanger the tribunal established for the community as a whole. For the same reason a private person is not allowed, by compounding a crime or stifling a criminal prosecution, to get redress for his own rights at the expense of the rights of the state. An agreement may be voidable because of duress if made to

[383] Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S. 643.

[384] Nichols v. Mudgett, 32 Vt. 546.

gain release from the restraint of unlawful imprisonment, or from fear of imprisonment or prosecution, but an agreement to gain release from lawful imprisonment or to stifle criminal prosecution is void because of illegality.

ILLUSTRATIONS.

(1) B is brother and heir at law of H, and A is cousin of H. H wills all his property to other parties. In consideration of A's promise to take steps to contest the will, advance the money, obtain evidence and instruct an attorney, B promises to pay A one-half of the personal property and a moiety of any landed estate he may recover by reason of setting aside the will. This is champerty. A is to assist B in recovering property and to share in the proceeds and, at common law, this is illegal, as likely to lead to perjury and perversion of justice. The fact of blood relationship makes no difference.[385]

(2) D, an attorney, is employed by P to sue an insurance company to collect insurance for P under an agreement to retain one-half of the amount received after payment of the costs. Is this champerty? Yes. Where the English law is followed, P can sue D in quasi contract for money had and received and recover the amount received by D from the insurance company.[386]

(3) A, an attorney, agrees to take charge of his case for B, without charge, if the suit is unsuccessful, on B's promise to pay a large and liberal fee in the event of success. Is this agreement bad for champerty or maintenance? No. It is not champerty for there is no sharing in the fruits of litigation. It is not maintenance for a lawyer to give his services.[387]

(4) A agrees to institute proceedings for B, pay all the necessary expenses and receive one-half of what he shall realize. This agreement is champertous and A cannot sue to recover compensation. To allow champerty would be to permit temptation to the avaricious and unscrupulous in the profession.[388]

(5) C claims to be owner of land, under a will, and employs F to conduct some litigation in regard thereto for him. In consideration of C's deeding one-half of the land to him, F promises not only to rely upon the success of the suit for compensation but to pay the costs and expenses. Is this agreement valid? Yes, where the old rules of champerty do not prevail. In New York, for example, except so far as preserved by statute, they are abolished. This sort of a contract stirs up no strife and induces no litigation.[389]

(6) H and G enter into an arrangement by which H is to seek out

[385] Hutley v. Hutley, L. R. 8 Q. B. 112.

[386] Ackert v. Barker, 131 Mass. 436.

[387] Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681.

[388] Thompson v. Reynolds, 73 Ill. 11.

[389] Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169.

claims against the G. N. Railway arising from its failure to fence its track, and to procure the parties to institute suits, which G is to conduct. H gets seventy-one of these claims and contracts authorizing G to sue. G institutes the suits, but the parties settle with the railway company contrary to the agreement. Can G recover for services performed? While the old common-law rules of champerty and maintenance are modified so that an attorney may take a contingent fee or carry on a suit for his share, the essential principle on which they rested still exists and agreements are void which stir up strife and contention, disturb the peace of society, lead to corrupt practices and prevent the remedial process of the law.[390]

(7) A sues the C railway to recover damages for destruction of property by fire, and C sets up the defense that A has agreed, with his attorney, to have him carry on the suit at his own expense and to receive one-sixth of the amount recovered, if successful. Can this defense be set up by a third party? No. If A has a good cause of action against C, there is no reason why he should be defeated in it because of a void contract between him and his attorney. The question of champerty should be determined between A and his attorney.[391]

(8) B's son forges his name to various notes aggregating over 7,000 pounds. The son has these discounted by W. After discovering this forgery, in order to prevent prosecution of his son, and in consideration of the bills and notes given up by W, B promises to pay the amount of the notes, and secures the same by mortgage. This agreement is void as an agreement to stifle criminal prosecution, and it makes no difference whether W forces it out of B or B proposes it himself.[392]

(9) M is employed by F to collect rent, and fails to account for a large sum. F threatens to prosecute him for embezzlement and M indorses to F, not because of the threat but as a free act, bills accepted by S. Is this illegal? No. It is not a case of stifling prosecution, but of a creditor obtaining payment of a debt due him. It does not appear that the bills are given to stop prosecution or because of fear, so that the payment of the bills is neither illegal nor procured by duress.[393]

(10) W buys a patent right of N for $6,000 in notes, but claims it is through the fraud of N and S. The notes are indorsed to innocent third parties and W sues N and S for the amount of the notes given for the patent right. He also gets N and S indicted for obtaining money by false pretenses. S also has a petition filed to have W adjudged a bankrupt. Then, in consideration of the promise of N's attorney to testify to all he knows in each of these three suits, W's attorney promises to join with N's in recommending the usual extension of mercy by the court. This agreement it not illegal because it does not attempt to stifle prosecu-

[390] Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035.

[391] Small v. Chicago, R. I. & P. R. Co., 55 Iowa, 582, 8 N. W. 437.

[392] Williams v. Bayley, L. R. 1 H. L. 200.

[393] Flower v. Sadler, 10 Q. B. Div. 572.

tion but lays the whole matter before the court for the free exercise of its discretionary power.[394]

(11) S takes out insurance, with A, on a ship, under a mutual agreement that in case of loss the amount of the recovery shall be what certain persons designated shall say. This agreement is valid and there can be no suit until the referee's action. Parties cannot oust the court of jurisdiction, but they may agree that no right to sue shall arise until a reference is made to arbitrators.[395]

(12) P promises to buy, in exchange for D's promise to sell, wheat on certain terms, "Should any differences arise as to the contract, the same shall be left to arbitrators in London in usual manner." The wheat delivered falls short of the amount named in the bill of lading, and P wants to have the matter referred to arbitration, but D refuses. The contract is valid, and an action will lie by P against D for its breach.[396]

(13) W, when about to enter the employ of the M railway as conductor, deposits $65 to be retained by M as security for the proper discharge of W's duty, and for failure to discharge his duty the M railway to retain all or a part as legal damages, M's president being sole judge and his certificate to be a final adjudication. This is an attempt to oust the courts of their jurisdiction and is invalid and W may sue in a law court and recover.[397]

(14) A is arrested for a felony and, to get him released on bail, N signs his bond and, in exchange for N's promise to indemnify M against all liabilities, M also signs the bond. Is the contract of indemnity enforcible? Yes. The obligation assumed by sureties on a bail bond is not personal security and, therefore, a contract relieving one from liability is not illegal.[398]

§ 149. Any agreement, the object of which is illicit cohabitation, is unlawful.

The reason such agreement is unlawful is that its object is contrary to the policy of the law. A promise to provide for a woman because of past illicit cohabitation under certain circumstances could be supported on moral grounds, but it would be unenforcible because a gratuity, and a promise for future illicit cohabitation is unenforcible because of illegality. Society has a right to have no conduct of this sort. The institution of marriage is the first act of civiliza-

[394] Nickelson v. Wilson, 60 N. Y. 362.

[395] Scott v. Avery, 5 H. L. Cas. 811.

[396] Livingston v. Ralli, 5 El. & Bl. 132.

[397] White v. Middlesex R. Co., 135 Mass. 216; Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115.

[398] Maloney v. Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418.

tion, and the protection of the married state is a part of the policy of every people possessed of morals and laws.

ILLUSTRATIONS.

(1) P agrees, on certain conditions as to price, to let B, a prostitute, have a brougham for the purpose of assisting her in carrying on her immoral vocation. Is the agreement enforcible by P? No. Any one who knowingly contributes to the performance of an act contrary to the law cannot recover the price of goods supplied thereby.[399]

(2) An unmarried woman, ignorant of the man's marriage, promises to marry a married man, in exchange for his promise to marry her. If it was not for the illegality this agreement would be perfectly valid, as it has all the other elements of a contract, including consideration, and as the woman is not tainted with illegality, she can recover for breach of contract.[400]

§ 150. Any agreement, the object of which is to restrain marriage, procure marriage for a reward, or discover private family matters, or which contemplates future separation of husband and wife, is unlawful.

These matters relate to the rights of individuals, yet their performance is of public importance either because tending to depopulate the commonwealth, or to promote licentiousness. The marriage contract, of all others, should be the result of full and free consent, and not only the parties, but society at large, is concerned in the observance of the duties incident to the marriage relation. While an intention to restrain marriage is illegal, a contract, or a condition in a will, imposing an obligation not to marry some particular person or class, or postponing marriage for good reason, is not contrary to public policy. Agreements providing for immediate separation are valid because the state of things has become inevitable, but those providing for the future are illegal because they induce the parties not to perform the duties in which society has an interest.

ILLUSTRATIONS.

(1) B, a married man, living apart from his wife, and expecting to get a divorce, promises to marry N, within a reasonable time after such

[399] Pearce v. Brooks, L. R. 1 Exch. 213.

[400] Millward v. Littlewood, 5 Exch. 775. See, also, Hanks v. Naglee, 54 Cal. 51.

divorce. Is this promise illegal? Yes. The illegality of a promise is determined at the time it is made and a promise, thus aimed at the institution of marriage, is contrary to the policy of the law.[401]

(2) A promises to give B $5,000 if she will return and live with him as his wife until his death and will not institute proceedings for divorce, and she does both. Is the promise illegal? A majority of the supreme court of Massachusetts decided that this promise is illegal, on the ground that conjugal consortium is without the range of pecuniary consideration, but Holmes and others dissented on the ground that it is not unlawful to make a lawful act. Marriage is a consideration for a promise to pay money, and, if it is not illegal to make such a promise for the assumption of conjugal relations, it is not, for the resumption of conjugal relations.[402]

(3) A promises to pay $1,000 to B if he will forbear marrying for the space of six months. B refrains from marriage for six months. Is this agreement illegal? Yes. There being no reason for B's refraining from marriage, this agreement is against public policy.[403]

(4) J promises to give H $5,000 if he will help him to get a wife. This H does. Can H enforce J's promise? No. It is contrary to public policy because the agreement is a marriage brokerage agreement.[404]

(5) A promises B, first to live with him and to take care of him while he lives, and, second, to refrain from marrying while he lives, in exchange for B's promise to provide for her amply and sufficiently to make her well off. Can A recover for her services? Yes. She makes one valid promise and one void promise for his promise, but the void promise is not illegal because one has a right to omit to marry if he or she chooses and, therefore, A is not in pari delicto. If B had promised to give $5,000 for A's two promises it would be impossible to tell how much of the $5,000 was for services and how much for refraining from marrying and, as it could not be divided, suit could not be brought on the express promise, but in this case there is no rule against recovery.[405]

§ 151. An agreement relieving a common carrier from responsibility for negligence to a passenger or goods is unlawful.

This is again because of the interest which the community as a whole has in the life of its citizens and in the preservation of the wealth of the state.[406]

[401] Noice v. Brown, 38 N. J. Law, 228.

[402] Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271.

[403] Sterling v. Sinnickson, 5 N. J. Law (2 South.) 871.

[404] Johnson's Adm'r v. Hunt, 81 Ky. 321.

[405] King v. King, 63 Ohio St. 363, 59 N. E. 111.

[406] New York Cent. R. Co. v. Lockwood, 84 U. S. (17 Wall.) 357.

§ 152. Any agreement, the object of which is a monopoly, where one or more persons procure the advantage of selling alone all of a particular kind of commodity, is unlawful.

It has been a common-law doctrine, though there are some indications that it will not always be, that in direct proportion as a monopoly benefits the individual, it is a detriment to the public. In the United States neither trades unions nor employers' unions are illegal per se; it is only as they contemplate an unlawful object that they become objectionable. Monopoly generally results from combination. Individuals may ordinarily combine their capital and energy to effect any object any one of them might pursue, but, if the end of their agreement is to destroy competition, it is held to be against public policy.

ILLUSTRATIONS.

(1) A and B, with others, are members of a Chicago Law Stenographic Association whose constitution (contract between the members) declares that it has for its object the control of the price to be charged, by restraining competition between members of the association, but it is not connected with the sale of any business. Is there any right of action for violation of any rules of this association? No. It is contrary to public policy, as it tends to create a monopoly against which public interests have no protection.[407]

(2) The candle manufacturers of the eastern part of the United States combine in an incorporated company to last six years, with the object of increasing the prices and decreasing the manufacture of candles in the territory covered. The members pay in a certain per cent of the price of candles disposed of on their own account and each receives his proportion of the pool. No member is obliged to operate his factory, as his proportion is determined by the business done in previous years. Is this compact illegal? Yes. It is contrary to public policy, and if one member drops out, he cannot sue to compel payment of money due.[408]

§ 153. Any agreement, the object of which is a restraint of trade, not necessary for its protection, is unlawful.

If a restraint of trade goes beyond reasonable protection it tends to injure the public, if not for other reasons in that

[407] More v. Bennett, 140 Ill. 69, 29 N. E. 888.

[408] Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660.

it deprives the state of the services of its citizens in their chosen field of activity, and it oppresses one party without benefiting another; but, if the restriction by being limited as to time or place, does not go beyond what is reasonably necessary for the protection of a trade or business, the public is helped rather than injured, for the public is interested in the parties on both sides. Contracts in partial restraint of trade help rather than harm both public interest and private welfare. They are necessary to trade itself. They protect all established business by safeguarding its secrets and making it saleable.

In the early days, when one who could not work at his trade could hardly find work, it was said that contracting not to follow one's trade was the same thing as contracting to be idle or to expatriate himself, but in the light of modern ease of change of pursuits this statement would be absurd. The rule now, as extended, seems to be that if it is necessary in order to give fair protection to business, the restriction may be unlimited, unless the agreement is one that will injuriously affect the public interests.

Restraints upon trade, as any other agreements, to be enforcible, must, of course, have a sufficient consideration. Restraints may not only be placed on trade by the voluntary act of the parties where it is necessary to determine whether they are against public policy; but it may be necessary for society because of public policy, as announced by the majority in the state, to place involuntary restraints upon trade, by grant, as in case of patents on inventions, or by custom, as in the case of particular trades, or enactment, as in the case of the protective tariff and positive regulations, topics already considered.

ILLUSTRATIONS.

(1) D assigns to P a lease, for five years, of a bakery in a certain parish, giving a bond, conditioned in the amount of fifty pounds, not to engage in the trade of a baker during that time anywhere in the parish. This bond, in voluntary restraint of trade, is not against public policy because it is necessary to protect P and it is not so unlimited as to deprive D of means of sustenance or society of a useful member.[409]

[409] Mitchel v. Reynolds, 1 P. Wms. 181.

(2) Four persons carry on the business of stevedoreing in Melbourne and apportion, among themselves, the business of ships consigned to four principal firms, and provide for the division of any other business, and each covenants that if he does any part of the stevedoreing assigned to another one of the parties he will give an equivalent to him, but the parties also covenant not to do any stevedoreing for any one except as allowed by the agreement. The last covenant is void as it restrains three of the four parties from exercising their trade without giving them any benefit or profit for the restriction, while the combination is detrimental to the public in depriving merchants of the power of employing any of these parties.[410]

(3) N has certain patent rights connected with the firing of guns and carries on the business of manufacturing. He sells his business to G and covenants not to engage in the manufacture of guns, etc., for twenty-five years, or to engage in any business liable to compete with this business, but retains a right to deal in explosives, etc., other than gunpowder. Is this covenant valid? Yes. The distinction between general and particular restraints is not well founded, but, in either case, the validity of an agreement in restraint of trade is to be determined by whether it exceeds the necessary protection to the purchaser. Whether the restriction is reasonable or not depends upon whether it affords fair protection to the interest of the parties and does not interfere with the interests of the public. Under this rule, a restriction might possibly be world-wide.[411]

(4) C, director of a school of languages in Providence, employs R to teach French under an agreement that for one year after the end of his service he will not teach French or German, or be connected with a school that teaches them, in the state of Rhode Island. Is the agreement enforcible? No. It is not necessary to be so extensive to protect the business of C, for no protection is needed outside of Providence.[412]

(5) Three men, as business managers of electric companies, agree to form one new company to which they sell the business of all three and, as a part of the good will of the business sold, each officer agrees not to enter into business to compete or interfere with the business of the new company for a period of five years. This stipulation goes no farther than is reasonably necessary to protect the good will of the business sold.[413]

(6) In consideration of a deduction from the retail price, A promises not to sell caffein for less than a stipulated price, in default of which he will pay $21 as liquidated damages. He sells below the agreed price. Is he liable to pay the $21? Yes.[414]

[410] Collins v. Locke, 4 App. Cas. 674.

[411] Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. [1894] App. Cas. 535.

[412] Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712.

[413] Anchor Elec. Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509.

[414] Garst v. Harris, 177 Mass. 72, 58 N. E. 174.

§ 154. Any agreement, the object of which is to injure the public health or safety, is unlawful.

Government is instituted and maintained and law is administered for the protection of the rights of the people, of which the right to life is not one of the least important, and where the subject-matter of a contract is designed to injure the public health or safety, it is contrary to the policy of the law and a remedy will be withheld from the party attempting the wrong though it does not amount to a crime or a tort.

ILLUSTRATIONS.

(1) C agrees to sell, and P to buy, such quantities of Menhadden as P's business requires, not to exceed C's catch, P to receive the barrels of Menhadden from C, but to brand them with misleading marks such as "Alaska Mackeral," etc. Can P recover on this agreement? No. It is not enforcible because of fraud upon the public.[415]

[415] Church v. Proctor (C. C. A.) 66 Fed. 240.

CHAPTER VIII.

FORMALITIES.

I. Formal agreements, § § 155-174
  A. Requirement of seal, § § 156-159
    1. Writing, § 157
    2. Sealing, § 158
    3. Delivery, § 159
  B. Requirement of writing, etc., § § 160-174
    1. Commercial paper, § 161
    2. Statute of frauds—Memorandum—Effect, § § 162-173
      a. Promise of executor or administrator, § 163
      b. Promise to answer for another's debt, etc., § 164
      c. Agreements made in consideration of marriage, § 165
      d. Agreements not to be performed within one year, § 166
      e. Conveyances of land or interests therein, § 167
        (1) Personalty, § 167
        (2) Realty, § 167
      f. Sales of goods, etc., § § 168-173
        (1) Value over certain amount, § 169
        (2) Sale and not contract for work, § 170
        (3) How satisfied, § § 171-173
          Receipt and acceptance, § 171
          Part payment, § 172
          Note or memorandum, § 173
  C. Miscellaneous statutory requirements, § 174
II. Formless agreements, § 175

§ 155. In order to be enforcible, agreements relating to certain subjects must be under seal, and agreements relating to certain other subjects must be in writing or in some other way satisfy the requirements of the statute of frauds.

The early doctrines of the law crop out here for the requirement of a seal is a doctrine that got a foundation in the law before the modern consensual contract was discovered. Before that time the only way that an executory agreement

could be made binding was by the contract under seal. This necessitates the classification of contracts into formal, or those under seal and those in writing, and the formless or oral.

§ 156. Conveyances of real estate are sometimes required to be under seal, and the parties may put their other agreements under seal as a matter of choice. If that form of expression is used, the contract is called a deed or specialty, and derives its validity from its form alone.

A promise under seal, at the common law, possessed validity, not because of the agreement of the parties nor of consideration, but from the formality itself. Therefore, a gratuitous promise under seal was binding, and an offer under seal could not be withdrawn. But today the doctrine of the seal has little application and in many states private seals have been abolished. Yet the rights arising out of a sealed contract may be greater than those arising from a simple contract. A right of action lasts longer before being barred by the statute of limitations. Estoppel sometimes applies, as it would not otherwise. A debt under seal is entitled to priority over simple contract debts, and the latter are merged in the former, where the same engagement is covered by both. At the common law, a corporation could not contract except under seal, but this rule does not obtain today. The contract under seal is a formal contract.

Contracts of record, including judgments and recognizances, have been classed as formal contracts, but they are properly classed as quasi contracts, having been relegated to that limbo by the action of assumpsit, which removed the law of contracts from its old foundation of debt (and covenant) and placed it upon its own new foundation of promise. This quasi contractual obligation ranks above specialties so far as priority is concerned.

A deed or specialty, is a contract under seal, and land is generally conveyed by deed, but it does not follow that they are synonymous. Deeds may not refer to land, and certain forms of conveyances require more than a seal. The deed of bargain and sale must be based on a valuable considera-

tion, and a covenant to stand seized must be based upon a good consideration.[416]

§ 157. A deed must be in writing or printed on paper or parchment.

Formerly a deed executed by one party had smooth edges and was, therefore, called a deed poll; while a deed executed by two or more was copied for each on the same parchment, and then cut apart by indented edges and was, therefore, called an indenture.

§ 158. A deed must be under seal (and signed).

At the common law a seal was wax, or other tenacious matter, with an impression on it, and that it was which constituted the primary distinction between writings sealed and writings not sealed; but, in recent times, the seal has become a mere form, and a flourish of the pen, the word "Seal" or "L. S.," or other mark, with pen or print, is sufficient. At the common law a deed need not be signed, the seal alone being sufficient, but where the seal has become a mere form the signature is a material part of the deed. The seal rendered a promise obligatory, not because it identified the party who affixed it, but because of the ceremony and solemnity necessary in affixing it.

ILLUSTRATIONS.

(1) The next of kin sues the administrator for an account, and the administrator pleads a release sealed and delivered, but not signed. Is this a good plea? Yes. The release does not need to be signed in order to be effectual.[417]

(2) A paper signed in Virginia has a scrawl on it for a seal, but no wax, but the instrument is made payable in New York. Is this a seal? According to the strict rules of the common law it is not and, as this instrument is to be tested and governed by the laws of New York, where the common-law rules prevail, it is not a sealed instrument.[418]

(3) N signs a promissory note, on which the word "Seal" appears immediately after his name. Is this a contract under seal? Yes. The necessity for an actual seal in its original sense has long gone by. This

[416] Anonymous, Bel. 111; Sharington v. Strotton, 1 Plowd. 298, 308a; Krell v. Codman, 154 Mass. 454, 28 N. E. 578.

[417] Taunton v. Pepler, 6 Madd. 166.

[418] Warren v. Lynch, 5 Johns. (N. Y.) 239.

is a specialty and an action thereon is not barred by a statute of limitation which applies to simple contracts.[419]

(4) A attaches his seal to an obligation but does not state "Sealed with my seal," nor "In witness whereof." Is this obligation good? Yes. The seal is sufficient according to the early common law.[420]

(5) In an action of covenant, A produces a writing which concludes "As witness my hand this 22nd day of February, 1791, W.," with a written scroll annexed to the signature of W. Should this be admitted as evidence? In some jurisdictions it is held that as a covenant is a deed, and the seal is one of the essentials of a deed, the clause "In testimony whereof" ought to recite that the maker hath thereunto put his seal, otherwise a supposititious seal may be affixed. As in this case he has not done this, but has said, "As witness my hand," this is not a good covenant.[421]

(6) E, one of the members of the firm of E. B and G, signs the firm name and affixes brackets for a seal on a promissory note. Will assumpsit lie against E, B and G? In any event, this is a sealed instrument as to one of the makers and where the old rule prevails, only covenant can be maintained thereon.[422]

(7) C makes a covenant with G, for the benefit of G's widow, who is H. Can H enforce this covenant? No. Only those who are parties to contracts under seal can sue on them and, in Massachusetts, H could not sue, though this were a simple contract, because of lack of privity.[423]

§ 159. A deed must be delivered. The maker must part with the right of control over it, and the grantee unconditionally accept it.

All that is necessary to constitute a delivery is an intention that the deed shall become operative. It may be handed to the other party to it, or to a third party, or even retained in the possession of the party executing it. A delivery may also be upon condition, when it is called a delivery in escrow.

ILLUSTRATIONS.

(1) A sues on an obligation of March 20th, dated October 10th, but delivered March 20th. Is March 20th the true date of the obligation? Yes, and, therefore, a declaration to this effect is not demurrable.[424]

(2) R, on December 14th, makes a proposal to take from S, insurance against burglary. A protection note is issued on December

[419] Lorah v. Nissley, 156 Pa. 329, 27 Atl. 242.

[420] Anonymous, 1 Dyer, 19 A.

[421] Austin's Adm'x v. Whitlock's Ex's, 1 Munf. (Va.) 487.

[422] Eames v. Preston, 20 Ill. 389.

[423] Saunders v. Saunders, 154 Mass. 337, 28 N. E. 270.

[424] Stone v. Bale, 3 Lev. 348.

18th. On December 27th, S executes a policy and attaches a seal to it but does not deliver the policy. On December 26th a burglary occurs. Can R sue on the policy? Yes. This is not a conditional execution and, as there was an intent that the policy should become operative, the fact that it remains in S's hands is immaterial.[425]

(3) H signs a deed and places it on a table where a scrivener is sitting, but the latter does not represent the grantee and goes away leaving the deed on the table. Is this a sufficient delivery? No. In order to be a complete delivery, there must be an acceptance by the grantee or his representative.[426]

§ 160. Many agreements must be in writing in order to be enforcible.

Unlike the seal, writing does not even at common law dispense with the other essentials of a contract, but, where an agreement is required to be in writing, that is merely an additional prerequisite to enforcibility. Parties, assent, consideration, definiteness, intention to create legal relations, freedom from vitiating circumstances and illegality, all of these things are required as well as writing.

§ 161. Bills of exchange and promissory notes must be in writing.

The necessity of the case makes this imperative. The object of commercial paper is to facilitate business by giving to the commercial world something that can readily pass from hand to hand like money, free from equitable defenses, and this could not be accomplished without some tangible writing.

§ 162. The statute of frauds (29 Car. II, C. 3, as adopted by statutes in the various states) requires that certain agreements, or a note or memorandum thereof, shall be in writing and signed (or subscribed) by the party (or parties) to be charged therewith, or some person thereunto by him lawfully authorized, before an action may be brought thereon.

[425] Roberts v. Security Co. [1897] 1 Q. B. 111. See, also, Butler v. Baker, 3 Coke, 25 a, 26 b.

[426] Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75.

One reason why the original statute of frauds was passed was because the plaintiff and defendant were not then competent witnesses in their own behalf, but, though they may now testify the real object to be accomplished by the statute, —prevention of fraud and perjury—makes it as necessary to have written evidence in certain cases as when the statute was first enacted.

If a subject comes within the statute, the statute can be satisfied, except in the case of sales of chattels, only by a written agreement or a note or memorandum of an agreement which means that the memorandum must show all the essential elements of the contract, though details may be omitted and no particular form need be followed; and, where the contract is required by the statute to be in writing, it cannot be modified by an oral agreement, for pro tanto that would be violating the provisions of the statute which, to prevent fraud and perjury and to secure better evidence than the slippery testimony of men's memories, eliminates oral and requires written evidence in regard to those subjects. Where a statute requires the agreement or memorandum to be "subscribed" it must be signed at the end, but, if the language is merely "signed," the signature may come anywhere. The signature may be made by an authorized agent who, if authorized to sign, may sign his principal's name and, if authorized to sell only, may sign his own name. Authority to execute a deed must be by deed, for the power must be of as high dignity as the act. Both parties do not need to sign, in order to give the memorandum validity, but no one can be sued (charged) unless he has signed. The memorandum must not only show who are the contracting parties, but, which is promisor and which promisee. The memorandum may consist of several papers, but they must appear on their face to be connected parts of one transaction, or when connected make a contract without further explanation.

Failure to comply with the statute, except in some jurisdictions in the case of sales, does not render the transactions void, but merely unenforcible; the statute affects the remedy only. Hence the statute of frauds that will apply is that of the place where the agreement is sought to be enforced.

Where there is part performance of an oral contract in regard to the sale of land, equity will sometimes compel specific performance. The party to be charged may expressly waive the defense of the statute. Though the agreement relates to some subject which falls within the statute, if it is executed on both sides, it is valid; and if it is executed wholly or in part only on one side, recovery may be had in quasi contract for benefits conferred, if the other party is in default. The statute does not apply to specialties.

The fourth and seventeenth sections of the original statute will constitute the basis for our discussion. They are as follows:

"No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." (Sec. 4)

"No contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (Sec. 17)

§ 163. The statute applies to an action "to charge any executor or administrator, upon any special promise, to answer damages out of his own estate."

The statute does not apply to promises of a personal representative to pay money out of his own estate, to subserve some end of his own, nor to pay a debt of his decedent out of the decedent's estate, but only to answer out of his own estate claims against the estate, for which he is liable only as representative of the decedent.

§ 164. The statute applies to an action "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person."

Statutes sometimes read: "Every special promise to answer for the debt, default, or doings of another." If the promise is not supported by consideration or is otherwise unenforcible, it is not necessary to consider whether it comes within the statute; but, if the contract possesses all the other elements of enforcibility, it is then necessary to decide whether it is a guaranty. The action referred to in the statute includes liabilities present or future arising out of tort as well as out of contract.

The term "another person" means some one other than the immediate parties to the agreement. Three parties are thus involved. There must be a promise by one person to pay a second person a third person's debt.

The promise must be collateral; it must be a guaranty. Therefore, there must be an original debt to which an auxiliary promise can be collateral. If the promisor is alone charged, or if the original debt is extinguished, or if the promisor is really subserving some interest of his own, or if the promise is to be answered for out of the third person's property, the promise is not a guaranty, and is not within the statute.

ILLUSTRATIONS.

(1) D, orally, promises P that if he will loan one E his gelding to ride to a certain place, E will safely return the animal. For this promise, P loans the gelding to E. Is the promise enforcible? No. This is a collateral undertaking, as P may sue E in detinue, and it is, therefore, within the statute.[427]

[427] Bourkmire v. Darnell, 3 Salk. 15.

(2) C owes P a debt, secured by a mortgage deed. D promises P to pledge as security certain bonds which he agrees to redeem at par within one year if P will redeed the land to C. On this inducement P deeds back the land to C. Is D's promise within the statute of frauds? No. P relinquishes his claim to the land and D enters into an independent obligation.[428]

(3) A certain firm draws some bills, which P accepts, on D's promise to find the funds for them. D's promise is not to pay if the firm does not as it is not expected that the firm will be able to pay. Is the promise within the statute? No. It is a promise to pay, in any event, and therefore indemnity, not guaranty.[429]

(4) B obtains a judgment against P. W requests N to become bail for a stay of execution on this judgment, and orally promises him to pay the judgment if P does not. N gives bail and has to pay the judgment. Can he enforce W's promise? No. It is a promise to answer for the debt of P. The act of giving bail is sufficient consideration for W's promise, but N should have secured a promise in writing.[430]

(5) S owes W a debt, and W orally promises R that if he will sign notes as surety for S, W will procure a chattel mortgage from S to secure payment of the notes. Is W's promise within the statute? No. S is the "another" in this case, but W does not promise to pay his debt, for the only liability of S to R is a possible quasi contract to arise in the future and, even if that is treated as a "debt," W's obligation is not collateral but original, a promise to pay not S's debt but R's, that is, to save him harmless by getting a mortgage. In order to bring the case within the statute, S would have to promise to give the chattel mortgage and W promise to get it if S should not.[431]

(6) B holds a note against P, with power of attorney to confess judgment. M has a judgment against P and tells B that if she will do nothing he will see that she is paid. She does not enter judgment or take any other steps, and the sheriff's sale goes on, M buying a large part of the articles sold. Is M's promise within the statute? No. It is original. His object is to subserve his own interests and the debt is his, not B's, nor P's.[432]

(7) In settlement of a suit against him, M gives H $1,062 in commercial paper in exchange for H's promise to take them in satisfaction of his claim of $750 and to pay a debt of $500 due from M to a third person. Is this promise of H within the statute? No. There is no promise to pay another's debt. After this transaction, the debt is H's. He has been paid to pay it.[433]

(8) P, a member of a stock exchange, promises D, who is not a

[428] Booth v. Eighmie, 60 N. Y. 238.

[429] Guild v. Conrad [1894] 2 Q. B. 885.

[430] Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15.

[431] Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875.

[432] Bailey v. Marshall, 174 Pa. 602, 34 Atl. 326.

[433] Meyer v. Hartman, 72 Ill. 442.

member, to transact business for such persons as D will introduce to him, and to divide commissions in exchange for D's promise to indemnify P against half of any losses. Is this promise within the statute? No. D is interested in the transaction. In order to bring it within the statute, he must be unconnected with it, except by means of a promise.[434]

(9) V gives O an order on H to pay O, at the end of each month, seventy-five per cent of the value of brick, delivered by O to V during the preceding month. H orally promises to do this. Is his promise within the statute? Yes. V is to be the principal debtor and the order is given as security for his debt. It is not like an oral acceptance of a bill of exchange.[435]

§ 165. The statute applies to an action "to charge any person upon any agreement made upon consideration of marriage."

Statutes sometimes modify this so as read, "Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry." However, this is but a restatement of the common-law interpretation of the statute. Mutual promises to marry do not come within this section; yet, if the agreement cannot by its terms be performed within one year from the making thereof, it will come within the next section of the statute. Part performance does not apply to a unilateral agreement within the statute for the same act of performance which brings the contract within the sweep of the statute cannot be relied upon to exclude it therefrom. In such cases the marriage is the acceptance of the proposal; it adds nothing to the circumstance, which makes a writing essential.

ILLUSTRATIONS.

(1) W enters into an oral antenuptial agreement with L wherein he promises her that if she will marry him he will give her, at once, $5,000 and, later, other property. L marries him. Is this promise within the statute? Yes. This is the exact case meant by the statute. The doctrine of part performance does not apply, for equity cannot repeal a statute.[436]

[434] Sutton v. Grey [1894] 1 Q. B. 285.

[435] O'Connell v. Mt. Holyoke College 174 Mass. 511, 55 N. E. 460.

[436] Hunt v. Hunt, 171 N. Y. 396, 64 N. E. 159.

§ 166. The statute applies to an action "upon any agreement that is not to be performed within the space of one year from the making thereof."

Statutes sometimes insert a phrase so that the provision reads "upon any agreement that by its terms is not to be performed within the space of one year from the making thereof." This section applies to all contracts whether they also come within other provisions of the statute or not, except where the statute permits oral leases for a term of three years. The statute does not apply to a contract that by its terms may be performed within one year from the time it is made, but to such only as by their express terms cannot be carried into full execution until after the expiration of a year; and, if it can be performed within one year at the time it is made, a subsequent modification which extends performance beyond a year (if not itself longer than one year) does not bring it within the statute. But if the parties intend the agreement to last beyond a year, it should be held within the statute, even though there is a possibility of performance within that time. Some courts hold that this clause means not to be performed on either side, so that if one party can perform his side of the agreement within a year, the fact that the other cannot does not make it within the statute. But, in any event, a party who confers benefits can recover in quasi contract.

ILLUSTRATIONS.

(1) In consideration of another promise by P, D promises to give P a certain amount of money, on the date of his marriage. This is not within the statute as it does not appear from the agreement that it is to be performed after a year. If the contingency may happen within a year, the promise is not within the statute.[437]

(2) By an agreement between W and T, it is agreed that, if W will grant the ground for a switch and put down the ties at a certain point, T will put down the rails and maintain the switch for W's benefit, as long as he needs it. Is the agreement within the statute? No. There is no stipulation which in terms, or by reasonable inference, requires the contract to continue more than one year. Within a year, W might die or abandon his whole business, or for other reasons cease to need the switch.[438]

(3) D sells out his grocery business to P, and orally promises him,

[437] Peter v. Compton, Skin. 353.

[438] Warner v. Texas & P. R. Co., 164 U. S. 418.

in that connection, not to go into business in the same town for five years. Is this agreement within the statute? No. If the death of the promisor within the year will merely prevent full performance of the agreement, it is within the statute; but, if his death will leave the agreement fully performed and its purpose carried out, it is not. Therefore, this promise is not within the statute.[439]

(4) In a deed, C assigns certain letters patent to H and N, who agree to pay therefor by installments extending over several years. H does not sign but affixes his seal. Is H's covenant within the statute, so that it must be signed by him? No. The statute of frauds does not apply to contracts under seal.[440]

(5) D lets H have twenty ewe sheep, under an agreement to return forty at the end of four years. Is this within the statute? Yes. It cannot be performed within a year, but as D has performed, though he cannot sue on the express contract, he may sue in quasi contract or tort, and H cannot plead the statute as a bar.[441]

(6) B agrees, on the 31st of March, to work for C for one year, to commence April first, for a stipulated price, promised by C. Is this agreement within the statute? Yes. If the term of service is to commence at any time subsequent to the day of the contract, and is for a full year, it cannot by its term be performed within one year from the making.[442]

(7) D and P make mutual promises to marry each other, at the end of a period of about five years. This agreement comes within the very teeth of the statute.[443]

(8) H's agent draws up a memorandum of an agreement, in which he places H's name at the top, and below writes a promise of E to work for H for three years for 130 pounds per annum, and E signs this, at the bottom. Is this a sufficient memorandum to bind H? Yes. It states all the elements of the contract and H's name as party to be charged is signed by his authorized agent. There is H's name, inserted by his agent, in a contract intended to be binding on E, and that it is in the form of an address is immaterial.[444]

(9) T and others agree, in writing, to herd cattle for B for a term of about two years, each to receive for his labor one-sixth of the price the cattle sell for above a certain price. B does not sign this agreement, but, in subsequent letters, refers to "The agreement" again and again. Therefore, this is a sufficient memorandum to bind him, in a suit by T. It is not necessary that the writings should, on their face, demonstrate their reference and, unless B by oral proof can show that he meant

[439] Doyle v. Dixon, 97 Mass. 208.

[440] Cherry v. Heming, 4 Exch. 631.

[441] Dietrich v. Hoefelmeir, 128 Mich. 145, 87 N. W. 111.

[442] Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660; Odell v. Webendorfer, 50 App. Div. 579, 64 N. Y. Supp. 451.

[443] Derby v. Phelps, 2 N. H. 515.

[444] Evans v. Hoare [1892] 1 Q. B. 593.

some other agreement, he is estopped from denying that the agreement referred to in his letters is the one signed by T.[445]

§ 167. The statute applies to an action upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them.

The original statute excepted leases for three years or less, and modern statutes generally except from the operation of the statute "leases for a term not exceeding one year" and "contracts for the leasing for no longer period than one year." Whether sales of the products of the soil come within the statute or not, depends upon whether the products are personalty or realty. Fructus industriales (or crops produced by annual cultivation), fructus naturales (or natural growths) after severance, and minerals after severance, are personalty, and a contract regarding them or which contemplates the passing of title only after removal is not regarding land. An easement, but not a mere license, true fixtures, fructus naturales and minerals before severance, are interests in land. The statute does not apply to judicial sales, and equity will decree specific performance of an oral contract, where the party asking for relief has performed such acts, on the faith of it, that otherwise he would suffer an injury amounting to fraud (as where possession has been taken and purchase money paid, or permanent improvements made.)

The statute of frauds does not apply to partnership agreements for the purchase and sale of land. There is no conveyance nor contract to convey land, or any interest therein. If later, pursuant to their agreement, the partners buy or sell land, the transfers, or agreements to transfer title will have to be in writing, but the partners do not convey, or contract to convey, any land from one to the other. The statute does not apply to oral partitions of land by tenants in common by marking a division line, for there is no acquisition of land nor transfer of title, but only the setting apart in severalty of the interests held in common.

[445] Beckwith v. Talbot, 95 U. S. 289.

ILLUSTRATIONS.

(1) A orally agrees to sell B, and B agrees to buy, certain growing timber. Can B sue A for breach of contract if he refuses to perform? No. This is a sale of something which is a part of the realty and the contract must be in writing.[446]

(2) A tenant puts certain chattels into D's mill, but does not remove them during his term. Thereafter, the tenant sells them to P, who orally sells them to D, on his oral promise to pay a certain price for them. Is this within the statute? Yes. As the chattels are not removed before the end of the term they become fixtures, in the true sense (land), and a writing is essential. P cannot recover on the express contract.[447]

(3) D sells to P, at auction, building materials, composing a certain building, for a certain price, the building to be torn down within a certain time. P pays down 100 pounds. Later D returns this and P sues for specific performance, etc. Is this a sale of land or of chattels? It is either a sale of land, as being a sale of the house standing, or at least the right to possession of the land or house for the purpose of pulling down the house, and this is an interest in land. If the owner should agree to sell the materials in the house after he should pull it down, it would be a sale of chattels.[448]

(4) W orally agrees to sell L, for $175, his dwelling house, W to deliver it to L, standing upon blocks, within a certain time, and L agrees to accept and pay the price. W delivers it. Is this a sale of land? No. As the severance is to be made before sale, it is a sale of chattels.[449]

(5) I is orally authorized to sell certain land for D, and signs a contract for a sale of the land with D's name by I "as agent." Does this satisfy the statute? Yes. Authority to convey must be in writing under seal, but an authority to make a contract for a conveyance need not be.[450]

(6) P and D enter into an oral agreement wherein they are to pay off the incumbrances on certain real estate, sell and dispose of the same and share the profits and losses. In a suit for an accounting, is this oral agreement competent evidence? Yes. A partnership agreement for buying and selling land does not need to be in writing. It does not transfer any title to land, nor create any interest in land.[451]

(7) D orally agrees with R to acquire the title to an undivided two-thirds of certain land in his own name, and to convey to R an undivided one-third, for R's promise to pay one-third of the purchase money and one-half of the expenses. Is this agreement within the statute? Yes. The circumstance that at the time of the agreement D does not

[446] Hirth v. Graham, 50 Ohio St. 57, 33 N. E. 90.

[447] Lee v. Gaskell, 1 Q. B. Div. 700.

[448] Lavery v. Pursell, 39 Ch. Div. 508.

[449] Long v. White, 42 Ohio St. 59.

[450] Johnson v. Dodge, 17 Ill. 433.

[451] Bates v. Babcock, 95 Cal. 479, 30 Pac. 605.

own the land brings the case more clearly within the statute. Here, there is no right of quasi contract for D has not given R any of the benefits.[452]

(8) P and D make an oral agreement that D shall bid off and buy a certain estate, upon the joint account of both, in equal shares. Is the agreement within the statute? Yes. Hence P cannot enforce a trust in the land, in his favor, after it is conveyed to D.[453]

(9) By an agreement in writing, D agrees to convey to P certain land, and P thereupon enters into possession. P then agrees, verbally, to sell and surrender an undivided one-half back to D, for his oral promise to pay $3,500. D goes into possession and sells the land to a third party. Can P recover the $3,500 orally promised him? No. Either the written agreement which gives P an equitable interest in the land will have to be rescinded, or P's conveyance will have to be in writing. There is no evidence of rescission and there is no written conveyance. The mere surrender of possession is not sufficient part performance.[454]

(10) W and R are tenants in common of a certain tract of land. They orally partition same by marking the division line. Is this partition within the statute of frauds? No. It is not a sale or transfer of land, or any interest therein.[455]

(11) P and D have a dispute as to a boundary and then they get a surveyor to re-survey, and place a fence on the line, and acquiesce therein for six years. Is this valid? Yes. Where the owners of contiguous lots by oral agreement mutually establish a dividing line not then established and, thereafter, use and occupy their respective tracts for a time, the agreement is not within the statute of frauds. After this long acquiescence P is estopped from denying the agreement.[456]

(12) P takes from D a letter head on which D's name appears and writes an offer to buy certain land, which he supposes D owns, and signs his own name thereto. D is not the owner and refuses to convey. P sues D. Is this memorandum signed by the party to be charged? No. The address at the head is no part of the document. In order to bind a party, a name thus placed must be recognized as his own name by the party whose name it is, as by writing it for the purpose of a memorandum or by sending it.[457]

(13) J signs a memorandum of a sale of land which on its face is complete, but the testimony shows that the consideration stated is not the true consideration. Must the memorandum state the consideration? By statute it is sometimes expressly enacted that the consideration need not be expressed; otherwise, it must be. If it were open to the

[452] Dunphy v. Ryan, 116 U. S. 491.

[453] Parsons v. Phelan, 134 Mass. 109.

[454] Dougherty v. Catlett, 129 Ill. 431, 21 N. E. 932.

[455] McKnight v. Bell, 135 Pa. 358, 19 Atl. 1036.

[456] Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. 931.

[457] Hucklesby v. Hook, 82 Law T. (N. S.) 117.

vendee to prove by oral testimony the price to be paid, he might prove any other terms of the contract, and the statute would no longer prevent frauds and perjuries. In a unilateral contract, the consideration is the act of acceptance, in a bilateral, it is a promise; and if either element of the agreement is shown it is almost inevitable that the consideration will be shown.[458]

(14) G is agent for H, but, without authority in writing referring to the specific property, sells an "estate on Congress Street," to D, for $1,100, executing a memorandum to that effect. H owns several estates on Congress Street. The agent has a letter which identifies the property, but there is no reference thereto in the memorandum. Is the memorandum sufficient? No. It shows on its face that it may apply to more than one estate. So far as the memorandum goes the agent's authority might as well be oral.[459]

§ 168. The statute of frauds applies to a "Contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards." In order that such contract shall be allowed to be good, the statute requires either a note or memorandum of the bargain signed by the party to be charged or by his agent, or a receipt and acceptance of part of the goods, or something in earnest to bind the bargain or in part payment.

Modern statutes sometimes declare that oral contracts of the above sort are void unless one of the three requirements named is met. Under this provision of the statute of frauds are included both actual sales, which presently pass the title to chattels, and contracts to sell, which contemplate the passing of title at some future time. It should be noted that this section of the statute differs radically from the section heretofore considered. While the section heretofore considered has one uniform requirement of writing, the section now under consideration gives an option between three requirements, only one of which is writing.

§ 169. The statute does not apply to contracts for sales unless the value of the goods, etc. reaches ten pounds sterling, or upwards.

[458] Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683.

[459] Doherty v. Hill, 144 Mass. 465, 11 N. E. 581.

The original statute has been generally changed to read value instead of price, and fifty dollars instead of ten pounds. It the contract embraces more than one article, the aggregate value is the value intended. The proposed American act to make uniform the law of sales suggests $500 as the value when the statute shall begin to apply.

ILLUSTRATIONS.

(1) P goes to B's shop and bargains for various articles, a separate price being agreed upon for each and no one article being worth ten pounds, but all together amounting to seventy pounds, and an account for the whole is made out. Is this sale within the statute? Yes. It is the intent of the parties to make one entire contract, so that, though P assists in measuring, cutting and marking the goods, the sale is not valid, for so long as the seller retains possession and his lien is not lost, there is no such receipt and acceptance as is contemplated by the statute.[460]

§ 170. The statute does not apply to a contract for work, labor and materials, but only to a contract for the sale of goods, etc. A contract is for the sale of goods, by the English test, if when ultimately carried out it will result in the sale of a chattel; by the New York test, if the chattels are in existence (in solido) at the time of the contract; by the Massachusetts test, if the contract when ultimately carried out will result in the sale of a chattel, except goods manufactured especially for the vendee and on his special order and neither intended nor adapted for the general market.

The English and Massachusetts rules look to the time of performance, the New York rule to the time of the formation of the contract. In England, sales of choses in action do not come under the statute, but in America they generally do, either by virtue of being expressly included or by judicial interpretation. In general, all personal property is included.

[460] Baldey v. Parker, 2 Barn. & C. 37.

ILLUSTRATIONS.

(1) At the order of F, P, a dentist, in England, makes two sets of false teeth for the price of twenty-one pounds, but these are never received and accepted. There is no part payment, and there is no memorandum, other than a letter in regard to an appointment but not disclosing any bargain. Is this a sale of goods? In England, the test is whether the contract when carried out will result in the sale of a chattel. If so, it is a sale of goods; if not, it is a contract for work. This contract results in the sale of chattels, and, as the statute is not satisfied, the dentist has no cause of action.[461]

(2) G and B, in Massachusetts, enter into an agreement, by which G is to make a buggy for B according to special directions given by B, for the price of $675. After G completes the buggy, he sends to B a bill, which B keeps. G retains the buggy in his possession until, nearly a month later, it is destroyed by fire. Is this contract within the statute? No. The Massachusetts rule is like the English rule, except that a contract to make chattels for the purchaser on his special order and not for the general market, as in this case is constructively a contract for labor and not a sale of goods.[462]

(3) In New York, D orally agrees to manufacture ten tons of paper for P, as soon as certain other work is finished, for which P agrees to pay fifteen cents per pound. Is the agreement within the statute? No. In New York, it is a contract for work, as in that state whether the contract is for a sale or not depends upon whether the goods are in existence at the time of the contract. Consequently, though oral, P can sue for breach of contract. Yet, of course, in New York, aside from the question of the statute of frauds, this is a contract to sell chattels and title will pass on the appropriation of the goods to the contract.[463]

(4) G, orally, promises to assign to L a real estate mortgage, for L's promise to pay $3,000 therefor. Is this within the statute of frauds? Yes. The statute includes all the objects of personal property. This is an incorporeal chattel, so that the only delivery possible is symbolic, and that cannot be in part, but this fact does not take the case out of the statute. Part delivery arises only where the nature of the chattels permits of it.[464]

§ 171. In a contract for the sale of goods the statute of frauds is satisfied if "the buyer shall accept part of the goods so sold, and actually receive the same."

The receipt of goods is the physical act and involves a change of possession, actual or constructive; the acceptance

[461] Lee v. Griffin, 1 Best & S. 272.

[462] Goddard v. Binney, 115 Mass. 450.

[463] Parsons v. Loucks, 48 N. Y. 17.

[464] Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134.

is the mental act, and must amount to a recognition of the contract; both must exist, but it makes no difference as to which happens first.

ILLUSTRATIONS.

(1) R orally buys from C 156 firkins of butter which he inspects and which constitute one lot and he gives C a card with his name and address, ordering him to deliver the goods to his agent. This C does. R refuses to keep the butter, on account of its condition. Is the statute satisfied? Yes. The goods are accepted at the time of the sale, and received at the time of delivery. The acceptance does not need to follow receipt.[465]

§ 172. In a contract for the sale of goods the statute of frauds is satisfied if the buyer "gives something in earnest to bind the bargain, or in part payment."

Earnest signifies any money or valuable article accepted by the seller as a token of good faith. Earnest is a form of part payment, yet differs from it in that there is a forfeiture if the buyer refuses to carry out his bargain. Modern statutes frequently require the part payment to be made at the time of the contract, but, if the subsequent payment is made for the express purpose of satisfying the statute, or if the parties then restate and affirm their agreement, it is sufficient to satisfy the statute, as the time is then the time of payment.

ILLUSTRATIONS.

(1) P owes D about four pounds for goods bought and sells about twenty pounds worth of leather to D, it being verbally agreed that the claim of four pounds shall go in part payment of the twenty pounds. Is the statute satisfied? No. Had the debt of four pounds actually been extinguished it might have amounted to part payment, without further ceremony of payment, but this agreement is that the leather shall be delivered by way of satisfying the debt of four pounds and D to pay the difference. There must be an actual payment; an agreement in an agreement is not enough.[466]

§ 173. In a contract for the sale of goods the statute of frauds is satisfied if "some note or memorandum in writing of the said bargain be made and signed

[465] Cusack v. Robinson, 1 Best & S. 299.

[466] Walker v. Nussey, 16 Mees. & W. 302.

by the parties to be charged by such contract or their agents thereunto lawfully authorized."

Sometimes the expression is "subscribed by the parties." In the case of sales of goods or contracts to sell goods, the statute may be satisfied in either of three ways, and the memorandum is the third. Other agreements, within the statute, can be satisfied only by writing, and where a sale within the statute is in writing, the rules governing the memorandum are those heretofore considered.

ILLUSTRATIONS.

(1) M, as agent for S, sells certain goods to G and they both sign, with their initials, the following memorandum:

"Sept. 19, W. W. Goddard,

12 mos.

300 bales S. F. drills..... 7¼
100 cases blue, do..... 8¾

Credit to commence when ship sails; not after December 1—delivered free of charge for truckage.

The blues, if color satisfactory to purchasers.

R. M. M.
W. W. G."

A bill of parcels is also made out under date of September 30th, stating purchase by G and footing up the price and the terms of payment, but it is not signed. Is this a sufficient memorandum? The original memorandum is sufficient except as showing which party is buyer and which is seller, as oral evidence is admissible to show that M is acting as agent and to explain the meaning of 7¼ and 8¾; and, when the bill of parcels is connected, it makes a contract without further explanation and, therefore, is sufficient.[467]

(2) W sells clover seed to D, and writes D's name at the top of a memorandum while D is looking over his shoulder. Is this sufficient to hold D as the party to be charged? No.[468]

(3) B sells hops to J, taking his order in an order book, and having J sign this. B's name appears only on the leather cover of the book into which the paper book is slipped. Is this a sufficient memorandum? Yes. When the memorandum is made, the book and cover are one.[469]

(4) S, orally, purchases of B goods of a value more than fifty pounds. These are sent to S, but arrive so badly damaged that S refuses to accept them. Then, by letter, he reiterates all the substantial parts of the contract, but concludes with a repudiation of his liability. This is

[467] Salmon Falls Mfg. Co. v. Goddard, 55 U. S. (14 How.) 446.

[468] Wright v. Dannah, 2 Camp. 203.

[469] Jones Bros. v. Joyner, 82 Law T. (N. S.) 768.

sufficient as a memorandum. The statute applies to the action and the memorandum may be made at any time. S admits the contract, but denies liability on other grounds. Therefore, the statute is not involved.[470]

(5) H authorizes R to buy a horse, for him, of G, which he does. Nothing occurs to take the case out of the statute of frauds except a letter setting forth the sale which passes between H and R. Is this sufficient memorandum? Yes. A note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent.[471]

(6) L orally buys coal from W, through his agent, B. L signs a memorandum of the contract and delivers it to B. B, at the same time, signs a memorandum, but in it the name of the purchaser does not appear. When construed together, they show who is buyer and who is seller, and they afford intrinsic evidence that they refer to the same transaction. Therefore, this is a sufficient memorandum and W is liable for breach of contract.[472]

(7) D buys goods of P on a written order of August 12th, and another of August 18th. On September 27th, the parties orally agree to rescind the contract of August 12th, and to extend the time of delivery in the contract of August 18th. D refuses to take any goods. What are P's rights? The contract of August 12th is rescinded but the contract to extend the time of delivery in the contract of August 18th is void, because not in writing and, therefore, the contract of August 18th stands and P can recover for breach thereof.[473]

(8) D buys, of P, certain iron, the memorandum of the contract signed by D stating that the iron shall be delivered at specified times. Later, D verbally requests P not to deliver twenty-five tons for a certain time and P verbally assents. Does the verbal agreement discharge the whole contract and yet give P no cause of action on it? The contract, being one required to be in writing in the first place, cannot be waived by parol and therefore, all this agreement amounts to is a voluntary withholding delivery at request, when P might insist at any time upon the original agreement being carried out.[474]

§ 174. Modern statutes, also, sometimes require to be in writing waivers of the defenses of the statute of limitations of a discharge by bankruptcy proceedings and of infancy, and contracts of insurance,

[470] Bailey v. Sweeting, 9 C. B. (N. S.) 843.

[471] Gibson v. Holland, L. R. 1 C. P. 1.

[472] Lerned v. Wannemacher, 91 Mass. (9 Allen) 412.

[473] Noble v. Ward, L. R. 1 Exch. 117, L. R. 2 Exch. 135.

[474] Hickman v. Haynes, L. R. 10 C. P. 598; Walter v. Victor G. Bloede Co., 94 Md. 80, 50 Atl. 433. Contra, Cummings v. Arnold, 44 Mass. (3 Metc.) 486.

power to bind a person as surety, contracts for interest above a certain rate, promises to dispose of property by will in a particular manner, sales of a vessel enrolled in the United States registry, and assignments of copyrights and patents.

§ 175. All other agreements do not require any writing, or other formality, as a condition to enforcibility.

CHAPTER IX.

CLASSIFICATION OF CONTRACTS.

I. As to form, § § 176-178
   A. According to nature of agreement, § 176
      1. Unilateral or bilateral, § 176
      2. Express or inferred, § 176
      3. Quasi, § 176
   B. According to number of parties, § 177
      1. Joint, § 177
      2. Several, § 177
      3. Joint and several, § 177
   C. According to formalities, § 178
      1. Specialty, § 178
      2. Written, § 178
      3. Oral, § 178
II. As to performance, § 179
   A. Executed or executory, § 179
   B. Conditional or unconditional, § 179
III. As to validity, § 180
   A. Valid, § 180
   B. Voidable, § 180
   C. Void, § 180
   D. Unenforcible, § 180
IV. As to subject-matter, § § 181-190
   A. Principal, § § 182-189
      1. Affecting property rights, § § 183-187
         a. Conveyances of land, § 183
         b. Leases, § 184
         c. Sales of chattels, § 185
            (1) Oral, § 185
            (2) Written, § 185
               (a) Bill of sale, § 185
               (b) Assignment, § 185
               (c) Indorsement, § 185
         d. Bailment, § 186
         e. Insurance, § 187
         f. Loans, § 186
         g. Annuities, § 187
      2. Affecting personal rights, § § 188-189

a. Marriage, § 188
b. Services, § 189
(1) As servant, § 189
(2) As bailee, § 189
(3) As public calling, § 189
(4) As profession, § 189
(5) As agent, § 189
(6) As partnership, § 189

B. Accessory, § 190
1. Suretyship, § 190
2. Warranty, § 190
3. Indemnity, § 190
4. Pledge, § 190
5. Mortgage, § 190

§ 176. A unilateral contract is a half executed, half executory contract, consisting of an express or inferred promise of one legal right and another legal right given in exchange therefor.

A bilateral contract is an executory contract, consisting of an express promise of one legal right, and a counter promise of another legal right given in exchange therefor.

An express contract is a bilateral contract all of whose terms are assented to either in speech or writing.

An inferred contract is a unilateral contract where either the act of acceptance, or both the act of acceptance and the promise offered, are inferred as a fact from conduct.

A quasi contract is not a contract, but a legal obligation, like a contract, created by implication of law.

In a unilateral contract only the promisor is under legal obligation, as the promisee has a legal right to the things which the promisor has promised to give or do, but the promisor has already received his right. In a bilateral contract the parties acquire reciprocal obligations, as each has a right to the things the other has promised to give or do. A offers a reward of a certain sum for the return of a lost article, and B acting on the offer returns the lost article, B's act accepts A's offer and creates a unilateral and inferred

contract, giving B a right to the reward offered. If A renders services for B expecting compensation, and B at the time knows that A expects compensation but, without objection, allows A to render the services, A's act accepts the promise offered by B's conduct, and creates another unilateral and inferred contract. If A confers certain benefits upon B, expecting compensation, and B, at the time, knows nothing of the act but subsequently elects to accept the benefits, there is no actual contract of any kind, as the act and promise are not given for each other, but A may sue B in quasi contract and recover the value of the benefits. If A offers to perform certain services for B for $100 and B accepts this offer, thereby promising to pay $100 for A's services, the latter's promise accepts the former's offer of a promise, and creates a bilateral and express contract, giving B a right to A's services and A a right to the $100 after performance.

§ 177. A joint contract is one where either the promisors are jointly bound, or the promisees jointly entitled, to the performance of a legal obligation.

A several contract is one where either each promisor is individually liable, or each promisee individually entitled, to the performance of a legal obligation.

A joint and several contract is one where the promisees may elect to hold the promisors either jointly, or severally, bound to perform a legal obligation.

If a promise in the words, "We promise to pay $100 to X and Y," is signed by A and B, the latter are jointly liable, and the former jointly entitled to the payment of $100. If a promise in the words, "I promise to pay $100 to X and Y," is signed by A and B, the former, jointly, may hold the latter either jointly or severally liable to pay $100. If a promise in the words, "We severally promise to pay $100 to X and Y to be equally divided between them," is signed by A and B, the latter are severally liable, and the former severally entitled to the payment of fifty dollars.

§ 178. A specialty is an express contract under seal.

A written contract is an express contract evidenced by writing.

An oral contract is an express contract without other evidence than spoken words.

A and B sign a written agreement, under seal, wherein A agrees to sell B a horse, for $200 and B agrees to pay that amount for the horse. This is a specialty, or deed. Remove the seal, and it is a written contract. Remove the writing, and it is an oral contract and enforcible, providing B at the time pays a part or all of the purchase price.

§ 179. **An executed contract is one where both parties have done all they have agreed to do.**

An executory contract is one where one or both of the parties have something yet to do.

An unconditional contract is an executory contract wherein the promises are independent because either absolute, divisible or subsidiary.

A contract upon condition is an executory contract, the performance of one or both of those promises depends upon a future and uncertain event, precedent, concurrent, or subsequent. If the event merely suspends the obligations of the parties, until it takes place or terminates them ipso facto upon its happening, it is a casual condition. If the event is an engagement of one of the parties and an essential term of the contract, so that it not only suspends or terminates the other obligations of the parties but gives a right to damages for breach thereof, it is a promissory condition.

An absolute promise is one the obligation to perform which does not depend on the performance of another promise. Divisible promises are those susceptible of being divided into several distinct and independent contracts. A subsidiary promise or warranty is one which, while a part of the main contract, is collateral to its main object.

A condition precedent is an uncertain event, generally an act, which must occur before the obligation of a promise arises, so that the promise does not have to be performed unless the event happens. A condition precedent may be express or implied, promissory or casual; but, except for

an express condition in a covenant, it must be a term in a bilateral contract. A condition subsequent is an uncertain event, generally impossibility of performance, which must occur after the obligation of a promise arises, so that the promise has to be performed if the event does not happen before the time for performance arrives and thus extinguish the obligation. A condition subsequent may be an express promisory condition or an implied or express casual condition, and may be a term in a unilateral or bilateral contract. A condition concurrent is an uncertain event, always an act, which must occur at the same moment as the obligation of a promise. A condition concurrent may be express or implied but it is always promissory and, except for an express condition in a covenant it must be a term of a bilateral contract.

By express stipulation in a covenant, the performance of some act by the other party may be made a condition precedent or concurrent, though the contract is unilateral; but, with this exception, promissory and casual conditions precedent and concurrent must be connected with bilateral contracts, for there is no simple unilateral contract, until the performance of one party has occurred. A bilateral contract ordinarily consists either of two or more covenants, or two or more promises, not a covenant and a promise, for, in the latter case it is possible for both the covenant and the promise to be unilateral, the covenant because of its form and the promise because as to it the covenant may be an act performed. This is illustrated by deeds, bills of sale, and insurance policies, unless they are given by way of performance of a previous bilateral contract. A bilateral contract at the time of its creation is executory on both sides, a unilateral on one; but both become executed as performance proceeds. An express condition arises from the words of the parties, an inferred from the nature of the contract as a whole, while an implied is a creature of the court for the furtherance of justice. An implied promissory condition is added by the law, yet not to alter a promise; but, because in a bilateral contract one promise to do a thing is given in exchange for another promise to do, and consequently the law presumes that each promise is intended

to be payment for the other and each performance to be payment for the other. For this reason promissory conditions are presumed to be concurrent. But, if the contract on one side is to do acts which take time, while on the other side it is to pay money or give property, or, if by the terms of the contract one side is to be performed before the other, the former promise in each case is independent and absolute, while the latter is subject to the condition precedent of performance by the opposite party. General dependency is where the performance of one promise must occur first and is independent and the performance of the other dependent upon the performance of the first, in which case the dependency applies to the whole of the two sides of the contract. Mutual dependency is where the performance of both promises must occur at the same time, but the dependency need not refer to the whole of the contract, but may refer simply to two acts. Because the doctrine of implied dependency rests on the presumption that one performance is an equivalent for another, if it appears that the performances are unequal there is no foundation for the doctrine, and it falls. Performances are often unequal in insurance contracts, and guaranties, and where a contract is partly unilateral and partly bilateral, or partly executed on both sides, unless each performance is exact payment for the other. This may also be true where there are two contracts in the same instrument, and where there are covenants or notes in separate instruments, and where there is a bilateral preliminary contract to make a unilateral final contract, the making of the unilateral being conditioned on performance, but, after made, being unconditional (as in executed policies, leases, and deeds).

Examples of promissory conditions precedent implied by the law are that one who attempts to transfer the general property to a thing has title thereto; that a thing delivered is like the sample or description of the thing sold; that a thing sold shall be fit for the particular purpose bought; where reliance is placed on another's skill and judgment, that the same shall be used; where quantity is an essential term of the contract, that the correct quantity is delivered; and that the buyer shall have a reasonable opportunity to

inspect. Of promissory concurrent conditions implied, the most common are delivery and payment. Some implied casual conditions subsequent are impossibility of performance arising from death, sickness, change in law, or destruction of the specific thing whose existence is essential to performance, the limitations on the liability of bailees, and insolvency in a sale on credit. A promise to do a thing, involving personal taste or judgment, to the satisfaction of the promisee, makes the satisfaction of the promisee an express casual condition precedent to recovery. The promisee is sole judge, and it is irrelevant that a reasonable man should be satisfied. An option to determine a contract, a sale or return, and the defeasance in a penal bond, or charter party, are examples of express casual conditions subsequent. A agrees to sell B a certain wagon for $40 and B agrees to give A $40 for the wagon. This is a bilateral agreement and executory on both sides, although, so far as the passing of title is concerned, it is an executed sale. If A delivers the wagon he does all that he is required to do, and now it is executory only on B's side; but this is not a unilateral contract, it is a bilateral contract partly executed, for whether the contract is unilateral or bilateral is determined at the time of its creation. If B also pays the $40 agreed, the contract becomes executed, both parties have done all they are bound to do, and there is no further obligation on either, although, as a result of the contract each has acquired new legal rights in rem. In the above illustration, delivery and payment are implied concurrent conditions, to be performed by the parties before the contract is executed. If the wagon is not in esse, but is to be manufactured according to certain specifications, the making of the wagon is an implied promissory condition precedent, and the manufactured article will have to be appropriated to the contract before the title will pass and the obligations of the buyer will arise, and there is an implied promissory condition, or warranty, that the manufactured article shall be reasonably fit for the purpose for which ordered. If, in the agreement, A gives B the right to return the wagon after a certain time, if not satisfactory to him, this is an express casual condition subsequent and if B takes advant-

age of it and returns the wagon, the title will revest in A, and if B has paid therefor, he can recover the price paid.[475]

§ 180. A valid contract is one whose obligation is binding upon both parties to the agreement.

A voidable contract is one whose obligation is not binding upon one party to the agreement, at his election.

A void agreement is one which creates no obligation.

An agreement of imperfect obligation is one which is incapable of enforcement, but otherwise valid.

A and B enter into and sign a written agreement whereby A agrees to work for one year from a certain future date, for the sum of $2,000, and B agrees to pay $2,000 for the work. If both parties have complete contractual capacity, this is a valid contract. If A is a minor, insane person, etc., or if the contract is procured by fraud, etc., it is a voidable contract. If the work which A agrees to perform is unlawful, because forbidden by law, or against the policy of the law, the agreement is void. If B does not pay, and A waits more than six years after performance before suing (or if B is discharged by proceedings in bankruptcy, or if the agreement is not in writing, to satisfy the statute of frauds), it is unenforcible.

§ 181. The subject-matter of a contract is the sum of its obligations, or all the legal rights created by the agreement.

The subject-matter of all the law is all legal rights; the subject-matter of contracts those particular legal rights which are created by agreement. The subject-matter of crimes is public legal rights in rem, invaded by wrongs; the subject-matter of torts, in general, private legal rights in rem, invaded by wrongs; and the subject-matter of contracts, private legal rights in personam created by agreement. The subject-matter of any particular contract is the

[475] Langdell on Contracts.

particular right or rights in personam created thereby while the subject-matter of any particular tort or crime is the particular right in rem violated by a wrongful act. But contracts are not only distinguishable from torts, crimes and other branches of the law, but they are distinguishable from each other by the nature of their subject-matter. As the legal rights created by agreement vary, so do the contracts vary, and thus it is possible to classify contracts according to the nature of their subject-matter.[476]

This classification is the most fundamental yet discussed, and many of the different contracts, thus differentiated, are so important that they are generally treated as special subjects for text-books; so that, in this connection, no effort will be made to do more than classify them, show their connection with the main subject of contracts, and point out their distinctions, leaving the student and lawyer to consult the books, on the various subjects, for their full treatment.

§ 182. A principal contract is one whose subject-matter is the creation of direct, rather than auxilliary rights.

A principal contract is to be distinguished from an accessory contract, to be referred to later.

§ 183. A conveyance is a contract whose subject-matter is the transfer from one person to another of the right to use, possess and dispose of land, and the right of the vendor to the price paid or promised therefor.

So far as the principal contract and the grantor are concerned, a conveyance is executed. The grantor has given either an act for a promise in a unilateral contract, or performance of a promise in a bilateral, and thereby rights in rem have been created. But a contract to convey is executory. It gives the grantee the right to the transfer of the title to the land and the grantor, or person who has

[476] Jacobson v. Miller, 41 Mich. 90, 1 N. W. 1013; Hamlin v. Tucker, 72 N. C. 502; Reed v. City of Muscatine, 104 Iowa, 183, 73 N. W. 579; 9 Col. Law Rev. 419.

promised to grant a right to the payment of the purchase price, or whatever else is promised for the promise to convey. A promises B to pay $5,000 for the ownership of a certain lot, and B promises to convey the title to the same to A for that price, and the parties reduce the contract to writing. The subject-matter of this contract is the right of A to a deed, and the right of B to the money. B executes and delivers the deed, that is, the instrument for effecting the conveyance, and A pays the money. Now, the contract is executed, and neither party has any further rights except so far as covenants in the deed are still executory. The subject-matter of the deed is the actual transfer to A of the right of title and his right to the things convenanted.

§ 184. **A lease is a contract whose subject-matter is the transfer from one person to another of the right to use and possess land for some period, called a term, and the right of the lessor to the rent promised therefor.**

Like a conveyance, a lease is executed by the lessor so far as the principal contract is concerned, and creates rights in rem, while the rights which it gives him against the lessee are the payment of rent and the fulfillment of other covenants on the lessee's part. A contract to lease is wholly executory and gives the lessor the right to whatever is promised therefor, unless the contract is unilateral. A lease is, strictly, the name given to the chattel real, known as a leasehold, but it generally has a wider significance. The word "lease" is also used to denote the instrument by which a contract of lease is effected.

§ 185. **A sale is a contract whose subject-matter is the transfer from one person to another of the right to use, possess and dispose of a chattel, and the right of the seller to the price therefor.**

So far as the passing of title is concerned, the contract is executed and the rights of ownership have been transferred, but the vendor may yet have a right to payment and the owner to delivery. A contract to sell gives the vendee

the right to the transfer of the title, and the vendor the right to the purchase price. This may be by oral or written contract and, if a written contract, it may be by bill of sale, assignment, or indorsement, but these do not modify the subject-matter so much as the form of the contract.

§ 186. A bailment is a contract whose subject-matter is the right of the bailee to the possession of a chattel, and the right of the bailor to have diligence exercised by the bailee in keeping the same and to have delivery made at the end of that time.

Here the right of the holder, or bailee, is to possession and to compensation therefor if any, and the right of the owner, or bailor, is to diligence in caring for the chattel and to its return. A contract to make a bailment gives the parties the reciprocal rights to have possession transferred. A promises to transport a quantity of goods for B, from one place to another, on B's promise to pay therefor the sum of $100 as freight. A has the right to transport the goods, and B the right to have A transport them. B delivers the goods to A. B now has the right to have the safety of the goods insured, or diligence exercised in the course of transportation, according to the nature of the bailment and to have the goods delivered to the consignee at the end of the route, while B will have the right to the freight if not paid in advance. The ordinary loan differs from a bailment in that it creates a debt, or the right to a certain amount of money, instead of the right to the return of the same chattel, in the same or in an altered form.

§ 187. Insurance is a contract whose subject-matter is the right of the insured to the payment of indemnity, or a certain amount of money on the happening of an uncertain event, and the right of the insurer to stipulated payment of premiums.

In fire insurance the subject-matter of the contract is not primarily the transfer of any of the rights of ownership, as is the case in conveyances, sales and even bailments, although, incidentally, title to the money paid as premiums

passes to the insurer and in case of the happening of the event the title to the money of the insurer passes to the insured; but the primary subject-matter of the insurance is the right to indemnity. The subject-matter of an annuity is the right of a person to a certain sum of money, payable yearly, for life, for a term of years, or in perpetuity, by another.

§ 188. Marriage is a contract whose subject-matter is the establishment of the status of a man and woman, for discharging to each other and the community the duties legally incumbent on husband and wife.

Here is another executed contract and the rights created are in rem. But a contract to marry is one whose subject-matter, if in the form of mutual promises, is the right of each party to the performance of the other's promise; if in the form of a written promise to marry for a written promise of a sum of money, the rights to the marriage and the money; if in the form of a written promise of a sum of money for a marriage, the right to the money after marriage.

§ 189. A contract of employment is one whose subject-matter is the right of one person to the services of another and the right of the other to compensation.

The subject-matter of the many contracts of employment varies with the contract and according as the services contracted for are to be rendered by domestic servants, farm hands, day laborers, bailees, those engaged in public callings, professional men, agents, or partners. Certain obligations exist in some of these contracts that do not in others. The person who hires a public service company acquires greater rights than one who hires an ordinary bailee. The contract of agency not only gives the principal the right to services and the agent the right to compensation, but it gives the agent certain authority, so far as giving rights to third persons or acquiring rights from them. A partnership is a peculiar contract, where each partner ac-

quires a right to carry on a business and to share as co-owner in the profits thereof.

§ 190. An accessory contract is one whose subject-matter is the creation of a right which is ancillary to another right.

This species of contract embraces guaranty, warranty, pledge and mortgage. A guaranty is a contract whose subject-matter is the right to the payment of a debt from the guarantor if the debtor does not pay. A warranty is a contract, whose subject-matter is the right to damages if the title or quality of a thing bought is not as represented. A pledge is a contract, whose subject-matter is the right to hold a chattel as security for a debt or engagement. A mortgage is a contract whose subject-matter is the conditional transfer of title as security for a debt or engagement. These contracts may be supported by the consideration in the main contract if entered into at the same time but must have a new consideration if entered into subsequently. Further than this, the person giving them only has the right to the fulfillment of the conditions.

CHAPTER X.

INTERPRETATION.

I. Rules of evidence, § § 191-194
   A. Proof of document, § 192
   B. Evidence that document is not a contract, § 193
   C. Evidence as to terms of contract, § 194
      1. Collateral or supplementary agreement, § 194
      2. Unexpressed terms of written agreement, § 194
      3. Usages, § 194
      4. Explanation of terms, § 194
II. Rules of construction, § § 195-203
   A. Primary rule—Intention of parties, § § 195-200
      1. Whole of contract considered, § 196
      2. Popular sense to words—Except, § 197
         a. Technical words, § 197
         b. Meaning by usage, § 197
      3. Written words control printed and figures, § 198
      4. Subject-matter, circumstances and object, § 199
      5. Construction given by acts of parties, § 200
   B. Several instruments relating to same subject-matter, § 201
   C. Favorable construction, § 202
   D. Doubtful language taken most strongly against user, § 203
III. Conflict of laws, § 204

§ 191. What are all the facts in regard to the words and circumstances making the various elements of a contract is for the jury. When they are found, whether they amount to a contract, and, if so, its effect, are questions for the court to decide according to the principles hereinbefore set forth.

If the contract is wholly oral, no special discussion of the proof of the same is necessary here, but full discussion thereof will be found in works on evidence. If the contract is wholly written its terms are not in dispute, and its legal effect is a question of law within the exclusive province of the court. But, though there may, apparently, be a written

contract, there may exist, to be submitted to the jury, certain questions as to the execution of the contract, or as to the existence of all the elements of the contract, or as to usages, supplementary terms and ambiguities; and it will be necessary to consider the rules upon some of these questions.

§ 192. A contract under seal is proved by evidence of sealing and delivery (and where attestation is necessary, testimony of attesting witnesses). A simple written contract is proved by oral evidence that the party sued is the party bound, and, if the contract is in several documents, that these are connected.

If a written contract is lost or inaccessible, oral evidence thereof is admissible according to special rules of evidence. If the contract is within the statute of frauds, in order to orally connect several documents they must contain a reference or, when connected, make a contract without further explanation. Written contracts are generally admitted on the pleadings or upon notice given.

ILLUSTRATIONS.

(1) In a suit for conversion, by the mortgagee of property, he attempts to show his title by producing a mortgage and having the mortgagor testify to his execution of it, without calling a subscribing witness. Is this sufficient proof? Not by the strict common-law rule.[477]

(2) An auctioneer makes out and signs a memorandum of the sale of a house, in which there is not sufficient reference to the conditions of payment. This fact is contained in handbills and newspaper notices signed by the seller. Is oral evidence admissible to connect these to the memorandum? No. There is no reference to them in the memorandum and when connected they do not make a contract without further explanation.[478]

§ 193. Oral evidence is admissible to show that a document is not a contract at all because lacking in some one of the essential elements or because of a condition.

[477] Story v. Lovett, 1 E. D. Smith (N. Y.) 153.

[478] O'Donnell v. Leeman, 43 Me. 158; Colby v. Dearborn, 59 N. H. 326.

ILLUSTRATIONS.

(1) By a contract in writing, P agrees to buy, and D to sell, a quantity of lumber. There is a contemporaneous oral agreement that the obligation of the contract shall not be complete until certain commercial agencies report favorably on P's pecuniary responsibility. Can this parol agreement be shown? Yes. This is an exception to the general rule excluding oral contemporaneous evidence. This does not vary its terms but shows that there is no contract.[479]

§ 194. Oral contemporaneous evidence is inadmissible to vary the terms of a written contract. Such evidence is admissible to complete the contract, by showing a supplementary agreement, or unexpressed terms; or to annex a term of special meaning by reason of a usage of trade or locality; or to explain the terms of the contract itself, by identifying the parties or subject-matter.

To admit oral evidence to vary the terms of a written contract would controvert the very object of the parties in reducing their agreement to writing.

ILLUSTRATIONS.

(1) W furnishes lumber to T who uses it in erecting a house for M. While his contract is still executory he releases or assigns it to M, by an instrument under seal, in which the consideration named is $25. By way of further consideration, M orally offers to pay T's debt to W for lumber. Is the oral testimony admissible? Yes. This is a supplementary agreement.[480]

(2) K sues S for 4,000 shingles. He delivers eight packs but they contain only 2,500 shingles. Can K show that, by a usage of the lumber trade, two packs are regarded as 1,000 shingles, without reference to the number? Yes, if the custom is so general and well established that those buying and selling may be presumed to deal in reference to it.[481]

(3) By written contract, M buys of G a reaper warranted to do certain work "with a good team." Is oral evidence admissible that at the time of the sale G says "one span of horses"? Yes. The word "team" is of doubtful significance; it has meaning, but it admits of several interpretations. Evidence to explain the meaning of the term is admissible, and declarations of the parties made at the time are competent for that purpose.[482]

[479] Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127.

[480] Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427.

[481] Soutier v. Kellerman, 18 Mo. 509.

[482] Ganson v. Madigan, 15 Wis. 158.

§ 195. The primary rule of construction is that, if not inconsistent with other rules of the law, the intention of the parties shall be discovered and effectuated.

There are many rules of construction, some in apparent conflict, more interdependent, and most of them of equal authority, so that to reach the right construction all should be read together; but if any rule is predominant it is that the intention of the parties must prevail. Sometimes, the intention of the parties being apparent, it may be carried out, though the literal words of the contract do not express it, or the general intent may be carried out, though by reason of some impediment the particular intent may fail. The courts will not make a contract for the parties, but they will undertake to find out what that contract really is, by ascertaining the intention of the parties. The language used by one party is to be construed in the sense in which it may be reasonably understood by the other.

§ 196. In discovering and effectuating the intention of the parties, the whole of the contract is to be considered, and each part so construed with the others as to give all of them some effect, if possible; if impossible, words inconsistent with the main intention are to be rejected.

It is presumed that each part is inserted for some purpose and it should be given effect, but it should not be allowed to defeat a clear intention gathered from the whole agreement. Grammatical correctness, or punctuation, or obvious clerical errors, will not be allowed to defeat the obvious intention of the parties. If clauses are repugnant, the one which expresses the chief object must prevail. A clause in wider terms, following specific enumeration, will generally be restricted to things of a like sort.

ILLUSTRATIONS.

(1) On a promissory note, signed by D, appears, written at the bottom, the memorandum, "One-half payable in twelve months, the balance in twenty-four months." This memorandum is written on the note, after signing but before delivery. Is this memorandum a part of the

note? Yes. Oral evidence is admissible, not to vary the contract, but to show the circumstances under which the memorandum is affixed, when every word and clause should be taken into consideration and if possible given an effect; but, having ascertained what the written words are, the contract must be construed according to them.[483]

§ 197. In discovering and effectuating the intention of the parties, the words of a contract are to be understood in their plain and literal signification. If the words have an ordinary and popular meaning, or a peculiar meaning attached to them by usage, and it comports with the intention of the parties as otherwise expressed, or if they are technical words which have a special sense given to them by the profession, or business, to which they relate, and they are formally employed, such meaning or sense will be given to them.

Words are ordinarily to be understood in their plain and literal signification, but when any question as to the same arises, the popular and ordinary sense is the one which is most likely to express the intention of the parties, except in the case of local usage or technical words, when the intention is most likely to follow the meaning given by usage, or by those employing technical words.

ILLUSTRATIONS.

(1) On the back of a note is the indorsement "Interest paid on the within note to July 26". In order to determine whether sureties are discharged or not, it becomes important to know whether this means up to July 26th or through July 26th, which would be an extension of the note. in its plain, ordinary, popular sense this means only up to, or before, the 26th. Accordingly, there is no extension of the note and the sureties are not discharged.[484]

§ 198. In discovering and effectuating the intention of the parties, in case of inconsistency, written words will control printed words, and words will control figures.

[483] Heywood v. Perrin, 27 Mass. (10 Pick.) 228.

[484] Stearns v. Sweet, 78 Ill. 446.

As the written words placed in a printed blank are selected by the parties for that special occasion, they are more likely to express the intention of the parties than printed words for general occasions. This rule is only to help arrive at the actual intention, and, if the intention is found to be otherwise, the written will give way to the printed.

§ 199. In discovering and effectuating the intention of the parties, the words of a contract are to be construed with reference to its subject-matter, the time and circumstances under which it is made and the object contemplated.

ILLUSTRATIONS.

(1) An insurance company insured A, on his ship, Minnehaha, "The risk to be suspended while vessel is at Baker's Island loading". Does this clause mean "for the purpose of loading", or while "actually loading"? A strict literal construction would favor the latter, but, looking at the circumstances under which it is made, the meaning which the parties intended is found to be the former "while the vessel is at Baker's Island for the purpose of loading", as it was the risk of the place and unfavorable moorage that the company desired to avoid. Therefore, as no violence is done to the language used, the sense in the minds of the parties should be given effect.[485]

§ 200. In discovering and effectuating the intention of the parties, in case of doubt, a construction which the parties themselves have placed upon the contract, in acting under it, will be followed if not contrary to other rules of law.

ILLUSTRATIONS.

(1) For example, if a deed gives the grantee the privilege of cutting timber on adjacent land for the purpose of "building" on the premises passed by the deed, the meaning of the word "building" may be learned from the fact that the grantee with knowledge of the grantor, thereafter, cuts timber not only to build buildings but to build fences.[486]

§ 201. Several instruments relating to the same subject-matter and by the same parties, if substantially

[485] Reed v. Merchants' Mut. Ins. Co., 95 U. S. 23; Mathews v. Phelps, 61 Mich. 327, 28 N. W. 108.

[486] Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14.

one transaction, are to be taken together and construed as one instrument.

The reason for the rule is that it is presumed this will carry out the intention of the parties.

ILLUSTRATIONS.

Illustrations of this rule are found in a deed of conveyance and a written agreement for reconveyance; a deed of conveyance and a written agreement to support the grantor; a note and a mortgage securing the same.

§ 202. **If the terms of a contract are susceptible of two constructions one of which will effectuate the contract and the other will not, the one which will effectuate it will be chosen.**

It is to be presumed that the parties intend the legal and not the illegal, the possible rather than the impossible. Yet this rule will yield to the true intention if it appears elsewhere to be otherwise.

§ 203. **The language of a contract, in case of doubt not otherwise removed, is to be taken most strongly against the party using it, unless such construction will cause a penalty or forfeiture.**

Conditions, exceptions, reservations and provisions, are strictly construed against the person in whose favor they are introduced. A condition is void which is so repugnant to a grant as to utterly defeat it. Unless time is of the essence of a contract because of stipulation or because of the nature of the contract, failure to perform a contract as conditioned does not amount to a breach and discharge. If a contract is such that damages for violation thereof are of uncertain value and it is agreed that a fixed sum shall be paid for its breach, this sum may be recovered as liquidated damages; but if the damages are of certain value and, on breach, a sum is to be paid in excess of that value, or, if a contract contains a number of provisions, damages on some

of which are certain and on others uncertain, and a fixed sum is to be paid for breach of any, this is a penalty.[487]

ILLUSTRATIONS.

(1) M executes to G a deed, by which, in the granting clause, he conveys all his title to all of certain property described, and in the habendum clause says "The interest and title intended to be conveyed" is only that acquired by M from one E, which is an undivided one-half. Which clause shall control? The first. A deed is always construed most strongly against the grantor. If the instrument is free from ambiguity, the intention must be ascertained from the language of the instrument. These clauses are in absolute conflict and, therefore, cannot be explained, and the first must prevail.[488]

§ 204. The legality of a contract is ordinarily to be determined by the law of the place where it is made (lex loci contractus). If it relates to land, its validity is governed by the law of the place where the land is located (lex situs). If it is to be wholly performed in another jurisdiction, its validity depends upon the law of the place of performance (lex loci solutionis).

These rules are not followed in deference to right, but as a matter of comity between states and nations.

Among the exceptions to the rules are those that no state will permit its laws to be evaded nor give effect to agreements plainly repugnant to the principles of law and morality, common to civilized nations, or contrary to the public interests of the state in which suit is brought.

Matters of adjective law are governed by the law of the place where the action is brought (lex fori).[489]

[487] Thurston v. Arnold, 43 Iowa, 43; Streeper v. Williams, 48 Pa. 450; Trower v. Elder, 77 Ill. 452.

[488] Green Bay & M. Canal Co. v. Hewitt, 55 Wis. 96, 12 N. W. 382.

[489] Hyde v. Goodnow, 3 N. Y. (3 Comst.) 266.

CHAPTER XI.

BREACH AND REMEDIES.

I. Breach, § § 205-208
  A. Repudiation, prevention, or failure to perform, § § 205-208
    1. Before performance is due, § § 205-208
    2. After part performance, § § 205-208
    3. By promisor, § § 205-208
    4. By promisee, § § 205-208
    5. Independent promises, § 208
      a. Absolute, § 208
      b. Divisible, § 208
      c. Subsidiary, § 208
    6. Dependent promises, § 208
      a. Promissory conditions precedent, § 208
        (1) Express, § 208
        (2) Implied, § 208
      b. Promissory conditions concurrent, § 208
        (1) Express, § 208
        (2) Implied, § 208
II. Remedies, § § 209-216
  A. Ancient, § 209
    1. Individual retaliation, § 209
    2. Customary retaliation, § 209
    3. Supervised retaliation, § 209
  B. Modern, § § 210-216
    1. Extra-judicial, § 210
    2. Judicial, § § 211-216
      a. Reformation, § 211
      b. Rescission, § 212
      c. Injunction, § 213
      d. Specific performance, § 214
      e. Damages, § 215
        (1) Nominal, § 215
        (2) Compensatory, § 215
          (a) For breach of contract, § 215
            (aa) Independent promises, § 215
            (bb) Promissory conditions, § 215
          (b) For quasi contracts, § 216

§ 205. A contract is broken if the promisor, in a valid unilateral contract, or either party, in a valid bilat-

eral contract, or the party bound, in a voidable contract, refuses, prevents, or fails in performance of the obligation which the contract imposes on him.

A breach of contract is a wrong as much as a tort is. A right in personam can no more be rightly violated than a right in rem. Quasi torts are disregarded in this statement, but the statement is true as to them. The nature of a promise is such that it gives the promisee a right to the thing promised, and the promisor the corresponding duty to give or do the thing promised not the duty to perform his contract, or pay damages, as he may elect. In case of breach of contract the law steps in and compels either specific performance in certain cases or, if not specific performance, payment of damages. for the double purpose of placing the particular person injured in the same situation as though performance had been rendered, and to deter people generally from breaking their contracts. Conditions, whether express or implied, cannot be modified or dispensed with by a court, but a breach must go to the essence of the contract. In the case of express conditions every breach, whether before performance is due or after part performance, goes to the essence of the contract because the parties have made all the conditions essential; but in the case of implied conditions, while, except in equity, an anticipatory breach, or breach in limine, goes to the essence of the contract, a breach after part performance will not in law or equity go to the essence of the contract, if it relates simply to the time of performance.

§ 206. A contract, not upon a condition precedent, is broken if either party to a contract absolutely and unequivocally renounces entire performance, so far as he is concerned, either before performance is due or in the course of performance, and the other party acts on the renunciation.

The repudiation of a contract may be withdrawn, at any time before the other party acts on it, but not afterwards. In order to constitute a breach the repudiation must be

absolute and unequivocal and refer to the entire performance, to which the contract still binds the promisor. Actual failure to perform the contract is not necessary. If he so desires, the promisee may refuse to accept the repudiation and thus keep the contract alive, so long as he does not increase the liability of the promisor.

ILLUSTRATIONS.

(1) D agrees with P to purchase one-third of a cargo of tea that P is to bring from China, subject to its arrival in Belfast and other contingencies, which make the delivery of the tea a condition precedent. While the tea is en route D notifies P that he refuses to fulfill the contract, and this refusal continues down to and includes the time when D is bound to receive. Is D guilty of breach? Yes. He may retract at any time before performance if P has not acted on his refusal, but if P has acted on it and, at all events, after time for performance has arrived, D is estopped from setting up a withdrawal of his refusal.[490]

(2) P and D enter into a contract under seal, by which P covenants to furnish D 3,900 tons of iron chairs, to be made and to be delivered according to certain stipulations, and to be paid for one month after each delivery, on the production of a certificate of D's engineer. P furnishes 1,787 tons and obtains a certificate from the engineer. Thereupon D notifies P that he will not take any more and P stops making them. Must P show that he has the chairs ready to deliver before he can maintain an action for breach of contract? No. The renunciation of the contract by D, acted on by P amounts to a breach, even though D should later ask P to go on with the contract, and it excuses P from performance on his part. P would be ready to complete the contract if it had not been renounced.[491]

(3) In consideration of P's promise to enter D's employment as a courier, for three months, to begin June 1st, D promises to employ and pay him a certain wage. On May eleventh, D writes P that he declines his services and, on May twenty-second, P sues D for breach. Is P entitled to commence an action for breach before the day of performance? Yes. Anticipatory breach. These are concurrent conditions, and each party must hold himself in readiness to perform, and, if one renounces his performance, it would be unreasonable to hold the other to readiness to perform. The injured party may either sue immediately or wait until the day of performance.[492]

(4) D promises to marry P, on the death of D's father but, while his father is still living, D announces to P his intention of not fulfilling his promise on his father's death. Can P sue at once without waiting for the

[490] Ripley v. M'Clure, 4 Exch. 345.

[491] Cort v. Ambergate, N. & B. & E. J. R. Co., 17 Q. B. 127; Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378.

[492] Hochster v. De La Tour, 2 El. & Bl. 678.

father's death? Yes. The fact that before the father's death D himself may die, or change his mind, is immaterial. By anticipation the contract is taken to be broken to all its incidents, if the promisee so desires. The termination of the betrothal is an immediate breach. If the promisee chooses to treat the notice as inoperative the contract is kept alive for the benefit of both parties. From the standpoint of logic it is easier to maintain that there can be no breach until the time for performance arrives.[493]

(5) P and D are ice dealers and, in consideration for P's promise to furnish D 3,245 tons of ice in 1879, D promises to return the same quantity of ice to P in the shipping season in 1880. Ice is worth fifty cents a ton in 1879. In July 1880, when ice is worth $5 a ton, P demands from D the ice promised and D refuses to return it immediately, but offers to pay fifty cents, or return the ice when the market reaches that point. Can P sue D at once for breach? No. This is only a qualified refusal, and there will be no breach by failure to perform until after the shipping season is over.[494]

(6) On the 11th of November, P and D enter into a contract, by which P agrees to deliver to D certain coke, from and after December 1st. November 19th, P notifies D that he will not deliver the coke, but instead of acting on this, on December 4th, D still insists upon compliance with the contract. Does D have a cause of action for damages? No. The contract is still alive.[495]

§ 207. A contract is broken if, before its performance has commenced or during performance, the fulfillment of the promise is rendered impossible, either by the promisor's own act or by the act of the promisee.

Whether the prevention comes from the promisor or promisee makes no difference so far as breach of the contract is concerned; it affects simply the remedial rights of the parties.

ILLUSTRATIONS.

(1) M leases land to S for twenty-one years and covenants that at any time during S's life, upon surrender of his lease, M will make a new lease during the residue of the years. By accepting a fine M grants the land to another and disables himself from taking a surrender or making a new lease. Can S sue M for breach of obligation, without first surrendering his old lease? Yes. Breach on the part of M excuses S from performance of the condition precedent.[496]

[493] Frost v. Knight, L. R. 7 Exch. 111; Johnstone v. Milling, 16 Q. B. Div. 460. Contra, Daniels v. Newton, 114 Mass. 530.

[494] Dingley v. Oler, 117 U. S. 490.

[495] Zuck v. McClure, 98 Pa. 541.

[496] Sir Anthony Main's Case, 5 Coke, 20 b.

§ 208. A contract is broken if a party thereto fails to perform either an independent promise, absolute, divisible, or subsidiary, or a promissory condition, precedent, concurrent, or subsequent, resting on him. If his promise is subject to a condition precedent, the condition precedent must be performed before he can be guilty of breach in not performing his own promise, and, if the promises are concurrent conditions, all he has to show is readiness to perform.

The conditions referred to here are those called vital, or promissory. With mere casual conditions we here have no concern. The questions involved in connection with the latter relate more especially to discharge of contract, and will be considered fully in the succeeding chapter. Failure to perform an independent promise amounts to a breach. Why? Because, if the independent promise is an absolute promise, the obligation to perform the same does not depend upon any other performance; if the independent promise is one of divisible promises, a breach thereof by one party does not preclude a recovery upon the other promises against the other party; if the independent promise is a subsidiary promise or warranty, it is collateral to the main contract, so that the performance or nonperformance of the warranty does not discharge or constitute a breach of the main contract. If the promisor, acting in good faith and attempting to perform the contract, does substantially do so, but from inadvertence and mistake leaves some trivial defects, while this is a technical breach so that he cannot sue on the contract, yet it will not prevent recovery in quasi contract for the benefits.

ILLUSTRATIONS.

(1) P leases premises from D, P covenanting to pay rent and to make repairs, and D covenanting for quiet enjoyment. P fails to perform his covenant to pay rent and D then breaks his covenant of quiet enjoyment by threatening P's sub-tenants with legal proceedings, if they do not pay D. Are these covenants dependent? No. A breach of either gives a cause of action.[497]

[497] Edge v. Boileau, 16 Q. B. Div. 117.

(2) A covenants to work for B for a year, and B covenants to give A twenty pounds, but it is not said that his covenant is given for A's work performed. In early law A could sue B without showing performance of his own covenant, as the covenants were held to be independent, and, in the days when a seal was sufficient to make a promise obligatory, nothing more had to be shown than sealing and delivery.[498]

(3) P conveys to O the equity of redemption of a plantation in the West Indies together with a stock of negroes, and covenants that he has a good title, and that O shall quietly enjoy the same, in consideration of O's payment of 500 pounds and promise to pay an annuity of 160 pounds for P's life. O refuses to pay the annuity, for the reason that P does not have title to some of the negroes. Is he guilty of breach? Yes. The covenant of title to these negroes is not dependent, as P has performed in part. Breach of the covenant by P gives O a cause of action for damages but it does not excuse him from all liability.[499]

(4) B, a tenor singer, agrees to sing for G from the 30th of March to the 13th of July at public and private concerts, to be in London for rehearsals at least six days before the beginning of the engagement, and not to sing outside G's theatre in Great Britian and Ireland without G's permission from the 1st of January to the 30th of December of that year, in consideration of which G promises to hire B and pay him a stipulated salary. B does not arrive in London for rehearsals until two days before the engagement, instead of six, and G refuses to go on with the performance of the contract. Is G guilty of breach? Yes. B's engagement to appear at rehearsals is not a condition precedent that goes to the essence of the contract, but it is a subsidiary promise for whose breach he, in turn, is liable. This is a breach after part performance, as B has refrained from singing in Great Britain from January 1st to March 30th.[500]

(5) P and D enter into a contract by which P promises to sell to D, for a named price, as much gas coal, in quality like a former cargo, as D's ship can fetch in nine months from a distant point. P ships coal of a quality inferior to the former cargo, but D accepts it, and P detains D's ship in loading, and D refuses to send his ship for any more coal though P is ready to supply it. Is D guilty of breach? Yes. D, by accepting the coal, waives the implied promissory condition precedent that it shall be like the sample, and the other promises being concurrent conditions, readiness to perform on P's part is sufficient.[501]

(6) R agrees to buy from A 5,000 tons of steel, to be delivered 1,000 tons monthly, commencing the succeeding January, and payment to be made within three days after receipt of shipping documents. In January A delivers only a part of that month's instalment and makes one delivery

[498] Anonymous, Y. B. 15 Hen. VII, fol. 10b, pl. 17; Brocas' Case, 3 Leon. 219; Pordage v. Cole, 1 Wms. Saund. 319l.

[499] Boone v. Eyre, 1 H. Bl. 273, note.

[500] Bettini v. Gye, 1 Q. B. Div. 183.

[501] Jonassohn v. Young, 4 Best & S. 296.

in February. A presents a petition to wind up the company. When asked to pay for deliveries made, erroneously thinking he cannot pay for the same, R says he will not pay unless A obtains the sanction of court. A few days later A notifies R that he regards this as a breach of contract. A sues for price of steel delivered. Can R counterclaim damages for breach of contract? This is another divisible promise and the qualified refusal of R to pay for deliveries made does not go to the root of the contract and does not discharge A from his obligation. A is, therefore, liable for breach and damages, and the claim therefor may be set up as a counterclaim.[502]

(7) On November 28th F agrees to buy of B 250 tons of pig iron at a given price, one-half to be delivered by B, at a named place, in two weeks, the remainder in four weeks, payment to be made fourteen days after the delivery of each parcel. By mutual consent, but under pressure on one side and resistance on the other, the time for delivery of the first parcel is delayed to May of the next year. B then demands pay for 125 tons and F refuses this on the ground that he has a right of set off for breach of contract, but finally pays and then demands the remaining 125 tons. B refuses to supply. Is B guilty of breach? Yes. The reason given by English courts is F has evinced no intention to abandon the contract but has made only a limited refusal. Payment for the first instalment is not a condition precedent to the delivery of subsequent instalments. The promises are divisible.[503]

(8) P agrees to sell O, at a certain price, 10,000 boxes of glass, to be of approved standard qualities, to be delivered during the four succeeding months and paid for on delivery. P delivers and O pays, for about 5,000 boxes which are not of the approved standard qualities, and then O refuses to receive any more. Is P guilty of a breach which excuses O from further performance? Perhaps he is guilty of breach but, as far as the discharge of the contract is concerned, O has waived this condition and is now relegated to damages for the breach and, as he has refused to continue performance, he is guilty of breach on his own part.[504]

(9) In a lease of a hotel and farm by D to P, D covenants to put and maintain fences and buildings in good condition, and reserves the right of entry to view and make improvements. D fails to keep premises in repair but P never gives him notice of condition of premises. Is D guilty of breach? Yes. Notice is not a condition implied here, as D might know or make himself acquainted with the need of repairs, on account of his reservation.[505]

(10) D guarantees the payment of 300 pounds towards the payment of certain goods, in consideration of P's guaranty that two bills of ex-

[502] Mersey Steel & Iron Co. v. Naylor, Benzon & Co., 9 App. Cas. 434.

[503] Freeth v. Burr, L. R. 9 C. P. 208.

[504] Cahen v. Platt, 69 N. Y. 348.

[505] Hayden v. Bradley, 72 Mass. (6 Gray) 425.

change of 162 pounds shall be paid when due. The goods are not paid for and D refuses to pay his guaranty until P pays his. Are these promises dependent? No. The promises are in exchange for each other but the performances are not, as neither expects to do anything. There is no basis for implied conditions.[506]

(11) In a lease, among other stipulations, the lessor, D, agrees with P to make necessary repairs on the outside of buildings. A carriage house falls and injures P's carriage, and D refuses to rebuild. P refuses to pay rent. These covenants are independent. P can be ejected for breach of covenant to pay rent and D is liable in damages for breach of covenant to repair the outside of the building from the time of fall to ejection, for this covenant includes the whole of the building. D is not liable for injury to the carriage, as the fall of the building is not covenanted against.[507]

§ 209. In early contract law, in case of breach of contract the injured party took such satisfaction as he was able to take against the wrongdoer, at first without outside regulation, later as regulated by custom, and finally as supervised by state political authority.

Under the rudest form of self-help, redress depends upon being stronger than the wrongdoer. Even as regulated and supervised, self-help is cumbersome. Except for some unnecessary delays and some formalities of adjective law, the modern remedial rights afforded by the state, are complete and efficacious, so far as the subject of contracts is concerned, and there is little need longer for the primitive remedies. Up to this point, we have been considering antecedent rights, a few in rem, arising from executed contracts, but most in personam, arising from executory contracts, unilateral and bilateral, and those imposed by the law without contracts and called quasi-contracts. In the rest of this chapter, we shall consider remedial rights which may all be regarded as rights in personam.

§ 210. In contract law today there still exist some extrajudicial remedial rights such as rescission of one contract by another contract, ex parte rescission

[506] Christie v. Borelly, 29 Law J. C. P. 153.

[507] Leavitt v. Fletcher, 92 Mass. (10 Allen) 119.

of voidable contracts and void agreements, release, waiver of mere conditions, accord and satisfaction, arbitration and award, and liquidated damages; but for most modern remedial rights the parties must go to the law courts.

It thus appears that a party often has open to him more than one course by way of remedy. Aside from the direct legal remedies, he may treat a contract as a nullity and sue in quasi contract or tort for the value or possession of property, or he may wait for the other party to sue, when he may assert the nullity of the contract as a defense; or he may ask to have the contract set aside by way of counterclaim. He may waive a legal remedy. He may terminate his right by a new agreement with the other party. He may privately settle with the other party for his breach. Parties may not bargain in advance not to resort to the courts.

ILLUSTRATIONS.

(1) D agrees to sell R certain hams, during a season, for which R agrees to pay a given price. D delivers hams during a part of the season and then fails to furnish any for the rest of the season. R has paid for only a part of the hams received. After learning that D will not be able to comply with his contract, does R have the right to retain the balance due to apply on a counterclaim for damages for breach of contract? Yes.[508]

§ 211. A suit for reformation will lie at the instance of the party prejudiced if the parties to a valid oral contract by reason of a mutual mistake, or by mistake on one side and fraud on the other, fail to correctly reduce the contract to writing, provided the rights of third parties have not intervened.

If the written contract does not represent the real agreement, a party sued can, on that ground, resist specific performance and that, even though the contract comes within the statute of frauds, for in that case there is nothing to be enforced at all—not the writing, for that is not the real agreement; not the real agreement, for that is not in writing.

[508] Robertson v. Davenport, 27 Ala. 574.

But, if there is a valid oral agreement, the final written agreement may be reformed on the theory that the original contract is being enforced.

ILLUSTRATIONS.

(1) Thus, reformation will lie for mistake in describing property or naming the grantee, or in an agent's incurring personal liability, or in date, or in rate of interest, or in name of beneficiary.[509]

§ 212. In case of a voidable written contract, the party, on whom the obligation is not binding, has a remedial right to the rescission of the contract by the court.

This applies to contracts voidable for fraud, misrepresentation, duress, undue influence, infancy, or insanity, and also to an apparent contract void for mistake or illegality. Of course, this right exists only before ratification of the voidable contracts, and instead of asking for an affirmative rescission the party may refuse to perform his contract and when sued set up his own act of rescission as a defense, or sue in tort if the contract is procured by a tort. No rescission will be granted where the former state of things cannot be restored, nor against innocent purchasers for value, except for infants. The effect of the rescission is to annul the contract from the beginning and, thereupon, certain quasi contractual obligations may arise, giving one or both parties new remedial rights which are sometimes enforced in the same suit as a condition of rescission, sometimes in another suit. An unenforcible agreement is distinguishable both from void and voidable agreements, for it cannot be set aside at the option of a party.[510]

§ 213. An injunction will lie against a contemplated breach of a valid promise to refrain from doing a certain thing if the remedy for damages is inadequate and the contract is not adapted to a decree of specific performance, and is free, fair and mutual.

[509] Paget v. Marshall, 28 Ch. Div. 255; Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114; Page on Contracts, Chap. 57.

[510] London & P. Ins. Co. v. Seymour, L. R. 17 Eq. 85.

ILLUSTRATIONS.

If an actor promises to regularly perform at a certain theatre, and nowhere else, or if a seller of a business promises not to engage in the same business for a time in the territory covered by the old business, the promisee is entitled to an injunction to restrain the promisor from violating his contract.[511]

§ 214. Specific performance will lie to compel the fulfillment of a valid promise to do a certain thing if the remedy for damages for breach is inadequate, and the contract is fair, free and mutual and capable of being presently executed.

ILLUSTRATIONS.

If the contract is to convey the title to land whose value always may be determined by considerations of health, neighborhood, profit, etc., or chattels of personal but nonmarketable value, the remedy at law is inadequate. If the contract is under seal, but gratuitous, or if one of the parties is an infant, it lacks mutuality. If the contract is one of employment or for the supply of goods in instalments, it involes a general superintendence and cannot be presently executed. But the fact that the plaintiff has broken a condition implied by law will not bar specific performance unless it goes to the essence of defendant's promise.[512]

§ 215. In case of the breach of a contract, the party injured is entitled, so far as money can do it, to be placed in the same situation as though the contract had been performed. Nominal damages are recoverable for the mere violation of the right created by the contract, and actual damages are recoverable for such injuries as arise according to the usual course of things (direct), or as may reasonably be supposed to have been in the contemplation of the parties at the time of the contract as the probable result of its breach (consequential). The amount of actual damages is measured by the value of all pecuniary injuries.

[511] Lumley v. Wagner, 1 De Gex, M. & G. 604; Cort v. Lassard, 18 Or. 221, 22 Pac. 1054.

[512] Adams v. Messinger, 147 Mass. 185, 17 N. E. 491; Flight v. Bolland, 4 Russ. 298; Lumley v. Wagner, 1 De Gex, M. & G. 604.

The breach may consist of repudiation, prevention or failure to perform a warranty or other independent promise, or a promissory condition, express or implied, and may occur either before performance is due or in the course of performance, but as soon as it occurs the other party is entitled to sue for damages. In contracts damages are awarded, not by way of punishment but by way of compensation and, therefore, except for breach of promise of marriage, exemplary damages are not recoverable. Damages for the injuries caused by a breach of contract may be measured in two ways. The parties to a contract may, in advance, assess or liquidate the damages at which they rate a breach of contract either if the value of the thing promised is uncertain, or if the sum agreed upon is fairly proportioned to the prospective loss, and the sum thus agreed upon as payable upon a breach of contract is recoverable. If the prospective loss is capable of estimation and the parties agree upon a sum greatly in excess thereof to be paid in case of a breach of contract, the stipulation amounts to a penalty or forfeiture and is unenforcible. If unliquidated the duty of assessing the damages devolves upon the court and jury. In addition to a right to damages in case of breach of contract by one party, the other party acquires the right to be exonerated from further performance and also certain quasi contractual rights.[513]

ILLUSTRATIONS.

(1) P covenants to transfer to D, on or before the 19th of November, at the Bank of England, 1,000 pounds of bank stock for 940 pounds, and D covenants to accept it upon three days' notice, and to pay that amount. P gives three days' notice and attends at the bank of England all day the 19th to transfer the stock, but D does not appear to accept it, and claims he is excused from performance because, on the 18th of November, P has no interest in any bank stock. Is D guilty of breach? Yes. P cannot recover the full price, but he can recover the difference in value between the contract price and market price. The question of P's disabling himself in advance does not come up here as no particular stock is mentioned.[514]

[513] Hadley v. Baxendale, 9 Exch. 341; Wolcott v. Mount, 36 N. J. Law, 262; Streeper v. Williams, 48 Pa. 450.

[514] Shales v. Seignoret, 1 Ld. Raym. 440.

(2) P agrees to sell D a particular parcel of land at an agreed price to be paid when conveyance is executed, and to give D the right, meanwhile, to take possession and make bricks thereon, and D agrees to take the conveyance and pay the price. D goes into possession. P tenders a conveyance. D refuses it. If P sues for breach of contract what are his rights? He is entitled to get the value of his bargain, not the contract price, but the damages he has sustained by D's breach of contract, providing D's promise is in writing; otherwise, P would be relegated to a suit in quasi contract for value of the use and occupation. If P desires the price of the contract he should sue for specific performance.[515]

(3) In a written contract, on December 15th, Y agrees to sell and deliver to K, at such time in the month of January as Y shall elect, 100,000 bushels of No. 2 barley at $1.20 per bushel. On the next day, K notifies Y that he will not comply with the contract. Y has part of the wheat on hand, buys enough to make up the 100,000 bushels and tenders to K warehouse receipts therefor the 12th of January. What are his remedial rights? K cannot create an anticipatory breach of contract unless Y chooses to act on it, consequently Y can hold K to the contract until the time for performance, and for breach at that time may sue K for the difference between the contract price and the market price. The fact that Y happens to buy some of the barley after notice does not affect the case at all.[516]

(4) D delivers to P two parcels of paintings to be cleaned and repaired, and P agrees to do this. P finishes the first lot and begins on the second, when D countermands his order in spite of which P goes on and completes the work. Is he entitled to recover the full price? No. He may recover for work already done and his loss from breach of contract, but he cannot increase the damages by his own act.[517]

(5) In consideration of P's conveying an estate to D, D promises to support P during his life. D does support P for some five years when his house is destroyed by fire, since which time he has failed to furnish support to P. Is D guilty of breach? If so, what is the measure of P's damages? Even in Massachusetts, this amounts to a total breach, as performance has begun, and the damages recoverable by P include damages for nonperformance in the future as well as in the past, based upon mortality tables. P is not bound to hold himself ready to be supported by D, nor to resort to successive actions.[518]

§ 216. In case of the breach or avoidance of a contract, quasi contractual obligations may be imposed by

[515] Laird v. Pim, 7 Mees. & W. 474.

[516] Kadish v. Young, 108 Ill. 170.

[517] Clark v. Marsiglia, 1 Denio (N. Y.) 317.

[518] Parker v. Russell, 133 Mass. 74.

> law on one party for the nonperformance of which the other party is entitled to recover damages. If the obligations are equitable, the net value of the benefits conferred, and if the obligations are of statute, custom, or record, the value of the damages he has sustained from breach measures the amount of the damages.

Under this rule recovery is allowed in a multitude of cases such as, for benefits conferred by either party to a voidable contract, except that an infant is only bound to account for what he still retains in specie at the time of avoidance; or by either party under a void agreement, providing he is not tainted with illegality; or by either party under a contract, unenforcible because of the happening of a condition or because of the statute of frauds, or because of breach, so long as he is not in default; or by the party conferring benefits through a mistake as to duty; or by the party for whose benefit obligations are created by statute, custom or record. But, in order to separate the subject of quasi contracts from contracts, and, as in quasi contracts, the remedial and antecedent rights are more closely related than in contracts, both the antecedent and remedial rights thereof have been treated together, in this book, in the chapter on quasi contracts.

CHAPTER XII.

DISCHARGE.

I. Of the antecedent rights of contracts, § § 217-226
   A. By operation of the original contract, § 218
      1. Casual conditions precedent, § 218
         a. Express, § 218
         b. Implied, § 218
      2. Casual conditions subsequent, § 218
         a. Express, § 218
         b. Implied, § 218
   B. By performance, § § 219-221
      1. Independent promises, § 219
      2. Promissory conditions, § 220
         a. Precedent, § 220
            (1) Express, § 220
            (2) Implied, § 220
         b. Concurrent, § 221
            (1) Express, § 221
            (2) Implied, § 221
               (a) Payment, § 221
               (b) Tender, § 221
               (c) Alternative promises, § 221
         c. Subsequent, § 218
            (1) Express, § 218
   C. By a new contract, § § 222-223
      1. Rescission, § 222
      2. Substitution, § 223
         a. Same subject-matter, § 223
            (1) Merger, § 223
         b. Partly old partly new subject-matter, § 223
         c. New parties, § 223
   D. By cancellation and surrender, § 224
   E. By alteration, § 225
   F. By breach, § 226
      1. Repudiation, prevention or failure to perform, § 226
         a. Promissory conditions concurrent, not absolute promises, § 226
         b. Promissory conditions subsequent, not divisible promises, § 226

c. Promissory conditions precedent, not subsidiary promises, § 226
II. Of remedial rights, § § 227-234
A. By the act of the parties, § § 228-230
1. Release, § 228
2. Accord and satisfaction, § 229
3. Arbitration and award, § 230
B. By act of law, § § 231-234
1. Judgment, § 231
2. Bankruptcy, § 232
3. Statute of limitations, § 233
4. Change in law, § 234

§ 217. The antecedent rights of contracts may be discharged by operation of the terms of the original obligation as expressed by the parties or implied by law, by performance, by means of a new contract, and by breach, alteration or cancellation of the old contract.

§ 218. A contract lapses or is discharged, from the time of nonperformance or nonfulfillment of a casual condition precedent or subsequent, express or implied, depending either upon one of the parties or a third person's doing a specific thing, or upon the happening of an uncertain event. When a party prevents a third person agreed on from performing the condition, his act also amounts to a breach.

A vital or promissory condition precedent is a promise by one party, whose performance discharges the person making the same but whose nonperformance, at a fixed time or if no time is fixed within a reasonable time from the making of the contract, ipso facto, discharges the other party, and also gives a cause of action for breach. These are more appropriately treated under "breach" and "discharge by breach and performance." A suspensory or casual condition precedent merely suspends the operation of the promise until the condition is fulfilled, and it is the condition appropriately treated here. The discharge here referred to includes antecedent rights only. Certain remedial rights survive. Their discharge will be referred to hereafter. Casual con-

ditions may be waived and then they have no more effect than as though they had never existed; but, unless waived, express and inferred conditions must be fulfilled to the letter; otherwise the court would be making a new contract for the parties. Yet this rule is often relaxed enough to allow a recovery in quasi contract, as when the contract has been substantially complied with, and where an engineer, whose certificate is a condition precedent to recovery, withholds the same through fraud or bad faith, or collusion, or mistake.

ILLUSTRATIONS.

(1) An insurance company, for the promise of L and B to pay stipulated premiums, promises to pay them 7,000 pounds, in case of loss by fire, upon condition that L and B procure from the minister and churchwardens of the parish a certificate that they believe the loss is occasioned without fraud. Loss occurs, but the minister and churchwardens refuse to certify, though other householders are willing to do so. Can L and B recover the amount of loss? No. This is a valid casual express condition precedent and its nonperformance discharges the contract. One party cannot substitute a new condition for one which both parties have originally made.[519]

(2) H, in consideration of S's promise to dispatch his vessel and receive a certain cargo at certain places, on his part, promises to provide the cargo at those places, provided the ship arrives and is ready by the 25th of June. The ship does not arrive until the 3rd of July. Is H discharged? Yes. This is a casual condition precedent and as it is impossible for it now ever to happen S can never sue. So far as appears S does not promise to have the vessel at the designated points by the 25th of June. If he had, he would be liable for breach of a promissory condition.[520]

(3) P agrees to build a building for D, who agrees to pay a certain price therefor, in instalments, as the work progresses upon receiving a certificate by the architect to that effect, the price of additions, or alterations, to be added to the sum contracted for upon condition that the price is first settled by the architect of D who is sole arbitrator. P performs extra work and renders an account, which the architect checks, but the architect has given no certificate. Can P recover from D? No. The production of the certificate is a condition precedent and must be done before liability, other than quasi contractual, arises.[521]

(4) D agrees to pay P certain sums of money, on the production to

[519] Worsley v. Wood, 6 Term R. 710.

[520] Shadforth v. Higgin, 3 Camp. 385.

[521] Morgan v. Birnie, 9 Bing. 672.

him by P of a certificate of L, a surveyor of D, that P has finished the work to his satisfaction. P performs all the work but L wrongfully refuses to give the certificate without any wrongdoing on D's part. Can P recover? Perhaps, in quasi contract, but not on the contract, as the certificate is a condition precedent. Every man is the master of the contract he may choose to make, and valid contracts must be construed according to the intent of the parties. One party cannot substitute a jury for a referee when the defendant does not prevent his action.[522]

(5) A agrees to do certain work for B, in consideration for B's promise to pay what a certain architect estimates it is worth, payment to be made upon the production of his certificate. A does the work, but the architect, in collusion with B and by his procurement, refuses to give A a certificate. Can A recover? Yes. This is in the nature of a quasi contract. The law will not allow B to take advantage of his own wrong.[523]

(6) T agrees to build a building for J and others, who agree to pay him therefor and for any extra services, upon the certificate of an architect, H, to whom all disputes concerning the work are to be referred and whose decision is not to be set aside for fraud or any other reason. H certifies for a smaller sum than is actually due in order to have more available for himself. Can T recover in quasi contract for labor and materials? No. The contract is binding. The certificate of H is an express condition precedent, but H has performed and the rights of T and J are to be governed accordingly. His judgment is final no matter what his own motives.[524]

(7) N agrees to do the mason work on two buildings for W, in consideration of W's promise to pay therefor $11,700, in instalments, upon the certificate of one M that the work is satisfactory. N substantially, but not strictly, performs the contract, but M refuses the certificate. Can N recover? Yes, in quasi contract, because of benefits received. The contract is a valid contract upon an express condition precedent and, if N did not have a good excuse for nonperformance so that W cannot set up the express contract, there could be no recovery until performance of the condition.[525]

(8) P and his tenant D enter into a contract by which P agrees to sell, and D to buy, certain goods at a valuation to be fixed by N, appointed by P, and M, appointed by D. M refuses to value the goods. D refuses to take the goods. Can P recover therefor? No. Not on the express contract, for there is an express condition precedent unperformed; not on quasi contract, for the goods have not been accepted.[526]

[522] Clarke v. Watson, 18 C. B. (N. S.) 278.

[523] Batterbury v. Vyse, 2 Hurl. & C. 42.

[524] Tullis v. Jacson [1892] 3 Ch. 441.

[525] Nolan v. Whitney, 88 N. Y. 648.

[526] Thurnell v. Balbirnie, 2 Mees. & W. 786.

(9) P declares on a covenant by which D undertakes to expend the sum of 100 pounds in improvements of a house demised, under the direction of a surveyor to be named by P, without averring any appointment of a surveyor, but alleging D's failure to make the improvements. Is the declaration good against demurrer? The declaration is bad, for the appointment of a surveyor is an express condition precedent. The appointment is first in the order of performance and its failure excuses D. If these were concurrent conditions it would be enough to allege readiness to perform.[527]

(10) In consideration of G's promise to pay $1,575 upon the satisfactory completion of the same and after acknowledgment by the owner, or the work demonstrated, H agrees to install a system of heating in G's mills. Is actual satisfaction of G a condition precedent to recovery? No. In doubtful cases, the courts are inclined to construe the agreements of this class as agreements to do the thing in such a way as ought to satisfy a reasonable man. Had H expressly promised to make a system to the satisfaction of G, making G the sole judge, then G's satisfaction would be a condition precedent.[528]

(11) B and another owe W a certain amount on account and B individually owes W another account. In consideration of B's promise to let W consolidate the accounts and B's promise to pay the same as soon as he is able, W agrees to let the account stand and to discontinue a suit on the joint account. Before W can recover must he plead and prove the fact that B is able to pay? Yes. The old account stated is settled, and the new obligation is conditional.[529]

(12) In a charter party, P agrees with D to send to M a ship "now at sea, having sailed three weeks ago", and load a cargo of linseed and carry it to another point, for D's promise to furnish the cargo and pay freight. The ship has not sailed as set forth in the charter party. D refuses to furnish the cargo. Is he guilty of breach? No. There is no contract at all here, as it is a condition implied by law that the parties do not intend to create legal relations when there is a mutual mistake as to the existence of the subject-matter.[530]

(13) P sells a quantity of sperm oil to D and D promises to pay for it a certain sum, at all events, and the further sum of over $5,000, on condition that, if more sperm oil arrives at N and B between April 1st and October 1st of that year than arrived during that time the preceding year, then the obligation is to be void. This is an express condition subsequent and D is bound on his promise until, and unless, he shows the happening of the condition.[531]

(14) M takes out a policy of fire insurance with an insurance com-

[527] Coombe v. Greene, 11 Mees. & W. 480.

[528] Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312. But see Doll v. Noble, 116 N. Y. 230, 22 N. E. 406.

[529] Work v. Beach, 59 Hun, 625, 13 N. Y. Supp. 678.

[530] Ollive v. Booker, 1 Exch. 416.

[531] Gray v. Gardner, 17 Mass. 188.

pany, in which is the condition "no liability shall exist under this policy for loss or damage in or on vacant or unoccupied buildings" unless consent for vacancy is indorsed on the policy. Is this a condition precedent or subsequent? Condition subsequent. It defeats a policy that is otherwise valid until the happening of the event and, therefore, the burden is on the company to show the happening of it to defeat recovery. If M should promise to keep the building occupied it would be a promissory condition subsequent but that is not the nature of this condition.[532]

(15) S, of Mississippi, has in the H. Co. of Connecticut an insurance policy in which it is provided that no suit shall be sustainable unless commenced within twelve months after loss. Loss occurs but S cannot sue within twelve months thereafter because prevented by the breaking out of the Civil War. If this provision in regard to suit within twelve months is regarded as a condition subsequent, being in the nature of a condition that defeats the policy by its happening, the prevention by the war destroys the condition and it does not revive after the cessation of the war. Hence S then has within the period of the statute of limitations to sue. The condition is precedent to the right to sue.[533]

(16) In writing, on December 22nd, P agrees to sell to D a particular farm and to execute and deliver a deed thereto on the following April 10th, no wood except firewood to be cut till the time of the execution of the deed, for which D promises to pay $3,250 on April 10th, or in default thereof $500, as liquidated damages. Before the 10th of April the buildings on the place, worth $1,600, are destroyed by fire. Is D discharged from performance? Yes. As the title is not to pass until April 10th, there is a condition subsequent, implied by law, that the subject-matter of the contract, in this case the right to the buildings as well as land, shall not cease to exist, and when that happens the other party is discharged. If the title had passed on December 22nd D would be liable to pay the full price of $3,250, not $500.[534]

(17) H sells E, on credit, 330 tons of bleaching powder, at an agreed price, to be delivered thirty tons a month. Nine instalments are delivered and paid for. The tenth is delivered, when E becomes insolvent and announces the fact to H. H then refuses to deliver any more bleaching powder. Is he guilty of breach? No. The happening of insolvency is an implied condition subsequent, which gives H the right to a lien to retain possession of the goods until paid therefor, but here the insolvent gives notice that he does not intend to pay and this discharges H.[535]

(18) D demises his premises to P for eighty years, and covenants that neither he nor his assigns will permit the erection of any building on a paddock fronting the demised premises. By authority of an act

[532] Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011.

[533] Semmes v. Hartford Ins. Co., 80 U. S. (13 Wall.) 158.

[534] Wells v. Calnan, 107 Mass. 514.

[535] Ex parte Chalmers, 8 Ch. App. 289.

of Parliament a railway company condemns the paddock, and D assigns the same to it, and it builds on the paddock. Is D liable for breach of covenant? No. There is a condition subsequent that subsequent impossibility of performance created by law discharges a promise. It cannot reasonably be supposed that this occurrence is within the contemplation of the parties at the time the contract is made. To hold D responsible would make a new contract for the parties.[535]

(19) C demises certain land to W for twelve years, and in the indenture is, among others, the covenant that W will dig and raise from the land an aggregate amount of not less than 1,000 tons nor more than 2,000 tons of potter's clay in each year of the tenure. There is not 1,000 tons of clay in the land. Is W discharged from liability? Yes. His particular covenant fails because of the condition subsequent implied that if there is no clay the covenant is discharged.[537]

(20) In March P and D enter into a written contract, whereby P agrees to purchase for a certain price, and D agrees to sell, 200 tons of Regent potatoes, grown on land belonging to D, to be delivered in September and October. D plants sufficient ground to ordinarily produce that crop but a disease attacks the potatoes and ruins nearly the whole crop. Is D discharged? Yes. As he agrees to sell potatoes, grown on his land, there is a condition subsequent implied that if there is no crop he is discharged. But if the promise had been general to sell 200 tons of Regent potatoes, no condition would be implied.[538]

(21) P and D enter into a contract by which D promises to furnish the Wachtel Opera Troupe to sing on specified dates. Wachtel himself, because of his fame, is the chief attraction. Without him the troupe is worthless and no one else can fill his place. He is sick and unable to sing those nights, and D does not furnish the troupe. Is D discharged? Yes. A contract for personal services is subject to the implied condition that the person to perform them shall be able to do so, and if he dies or becomes disabled, the obligation is extinguished.[539]

(22) P contracts to work for D during a sawing season, but owing to a cholera scare leaves D's employ, without his consent, before the expiration of the term. This is sufficient excuse to discharge P from liability, but any recovery on his part will have to be quasi contractual.[540]

(23) P is engaged by the G Insurance Company for a term of five years to act as general agent, but after three years the company is restrained, by an order of court, from prosecuting its business. Does

[535] Baily v. De Crespigny, L. R. 4 Q. B. 180.

[537] Clifford v. Watts, L. R. 5 C. P. 577.

[538] Howell v. Coupland, 1 Q. B. Div. 258; Anderson v. May, 50 Minn. 280, 52 N. W. 530.

[539] Spalding v. Rosa, 71 N. Y. 40; Lacy v. Getman, 199 N. Y. 109, 23 N. E. 452.

[540] Lakeman v. Pollard, 43 Me. 463; cf. Dewey v. Alpena School Dist., 43 Mich. 480, 5 N. W. 646.

this discharge it from further liability? Yes. The state makes it impossible; another condition subsequent.[541]

(24) P enters into a contract with D to drive his logs that spring down Hall Stream to the Connecticut River, but the water in the stream falls so suddenly and remains so low that P is unable to complete his contract. Is this an excuse for nonperformance? Yes. The parties contract on the basis of the continued existence of the water.[542]

(25) D, who has been a tenant of P for a year, holds over into the next year, although he has given P notice that he is going to vacate the premises. But the reason for his holding over is the sickness of his mother, who is so sick that it would have endangered her life to move her. Is D liable for rent for another year? No. The obligation to pay rent for holding over is created by law and, because D's surrender is rendered impossible by act of God, the obligation will not arise.[543]

(26) P charters a steamship of E to transport coal from Buffalo to West Superior but, at the latter place, P is delayed twelve days longer than is usually necessary, on account of a strike among its employes. The charter party is silent as to the time of unloading. Is P liable to pay demurrage? No. In the absence of express stipulation, the law implies an obligation to unload within a reasonable time, and unforeseen and extraordinary difficulties will excuse delay. That is, the charterer must unload within a reasonable time, provided he can with reasonable diligence.[544]

§ 219. A unilateral contract is discharged by the promisor's performance of his promise; a bilateral contract, by both parties' performance of their promises. When one party performs on his part the contract is discharged as to him.

If one party to a bilateral contract has discharged his part of the obligation, he is discharged from further liability, but the contract is still in existence. Performance may relate to independent or dependent promises. Hence, conditions precedent and concurrent have to be considered again in this connection. But performance relates only to promissory conditions express or implied, not to casual. Promissory conditions may be waived so far as the question of

[541] People v. Globe Mut. Life Ins. Co., 91 N. Y. 174; Thomas v. Hartshorne, 45 N. J. Eq. 215, 16 Atl. 916.

[542] Clarksville Land Co. v. Harriman, 68 N. H. 374, 44 Atl. 527.

[543] Herter v. Mullen, 159 N. Y. 28, 53 N. E. 700.

[544] Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co. (C. C. A.) 77 Fed. 919.

the discharge of the contract is concerned, but a cause of action for the breach still survives. For this reason, they are sometimes called warranties, but they are not collateral undertakings and, therefore, are not true warranties. If promissory conditions are performed the contract is discharged, and no cause of action for breach arises.

§ 220. Performance of a promissory condition precedent, according to a reasonable construction of its meaning, operates as a discharge as to the person under obligation to perform it.

ILLUSTRATIONS.

(1) P covenants that his ship shall go on an intended voyage, for D's covenant that, if the ship goes and returns, he will pay P a certain sum. The ship makes the voyage and returns. P's promise is an express promissory condition precedent, but performance of it discharges P.[545]

(2) An insurance company promises, in its policy, to indemnify K against loss by fire to a certain amount, provided he will keep a complete set of hooks showing purchases and sales, and a complete record of business, together with an inventory, and keep the same in a fireproof safe at night and when the store is not open for business, or in some secure place. Loss occurs from a conflagration, before which, except for his inventory, K removes to his residence all of his books, consisting of ledger, cash book, day book and inventory. The inventory is either lost or destroyed in the safe. Can he recover from the company? Yes. These are promissory conditions, but they must have a reasonable construction, giving them which, K is not bound to keep such books as the most expert book-keeper might, or in a safe that is absolutely fire-proof, and, with such construction, K has fulfilled the conditions.[546]

(3) A life insurance company issues a policy of insurance to W, upon her life, it being a condition precedent that the statements in the application of W are true, as they are warranted (i. e., made material representations) and made a part of the policy. In the application W says she has no brothers dead, when as a fact one brother in London, unknown to her, has died four years prior. This is another promissory condition, but it must have a reasonable construction, and, in the absence of more express stipulation, this condition will be interpreted to mean that so far as she knows she has no brothers dead, not that

[545] Constable v. Cloberie, Palm. 397.

[546] Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S. 132.

brothers are not dead, and thus interpreted she has performed her condition.[547]

§ 221. Performance of a promissory condition concurrent operates as a discharge as to the person under obligation to perform it, and mere readiness to perform is all that is required of him to put the other party in default.

In order to discharge the obligation of paying a sum of money due, the obligor, or debtor, must pay the exact amount due, in genuine money, at the time and place agreed, or pay something accepted by the creditor as a substitute. In the absence of agreement the presumption is that negotiable paper of the debtor is taken only as a conditional discharge, and if it is not paid the original debt may be enforced. If a creditor accepts payment from a volunteer, in some jurisdictions, the debtor may take advantage of it. If an instrument taken is that of a third person, it is presumed payment. In case of a number of debts owed to the same creditor, if a partial payment is made, with no directions from the debtor as to how it shall be applied, the creditor may generally apply it as he sees fit.

As applied to money demands, a tender or attempted performance of payment by the debtor, or some one authorized by him, to the creditor, or some one authorized by him, according to the time, place and mode of payment prescribed in the contract, if unconditional and kept good by readiness at all times to pay on demand, while it does not discharge the debt, yet it suspends the running of interest, precludes damages for nonpayment and gives the debtor a right to costs in case of suit.

In an alternative promise, where one promises to do one of several things, the right, within the time set by the contract, to elect which shall be done, rests with the promisor, unless the contract expressly or impliedly vests the right in the promisee, in which case he must give timely notice

[547] Globe Mut. Life Ins. Ass'n v. Wagner, 188 Ill. 133, 58 N. E. 970.

of his election, and an election of one alternative discharges the others.

ILLUSTRATIONS.

(1) By an indenture P covenants to convey to W certain land, pay $1,500 and give a note for $3,000 within forty-five days, in consideration of W's covenant to convey other land to P within forty-five days. Before the expiration of the forty-five days W dies, but no administrator is appointed, until some time later. Within a reasonable time after the administrator is appointed P tenders performance. Is this sufficient? Yes. In implied concurrent conditions readiness to perform is all that is required and impossibility to do this before discharges P from any breach.[548]

(2) T and S enter into a written contract, by which S agrees to engage and employ T, as its servant and representative salesman, for four years and to remunerate him by a stipulated salary, and T agrees to devote the whole of his time to S, etc. After the expiration of a little over half of the time, S notifies T that he will not be allowed to perform any more duties but will be paid his wages, as usual, in the future. Is this a breach or performance? Performance. S is not under obligation to find work for T, and so long as he is willing to pay wages there is no breach. If T were working on commission the case would be different.[549]

(3) By a written contract, B agrees to sell to F a cargo of maize as per bill of lading dated between the 15th of May and 30th of June, payments to be made in cash in London in exchange for shipping documents. B offers to F a cargo of one vessel, but without shipping documents, so that F is not obliged to accept it. Later, but within the time of performance, B offers the cargo of another vessel, which F refuses to accept, on the ground that he is not bound to accept it as a substitute for the first cargo. Is tender of shipping documents waived? Yes. As the first ship is not a proper one B is entitled to withdraw the tender and make another.[550]

(4) In a written contract, P promises to sell D certain real estate, of which he is not the owner and to which he does not have the ability to compel the owner to convey the title. P gets the owner to offer the place to D on different terms, but D does not accept these, and D also refuses to complete the contract with P. Does P have a cause of action? No. There is a concurrent condition which he must first perform, and which he cannot. This discharges D unless he has waived performance;

[548] Pead v. Trull, 173 Mass. 450, 53 N. E. 901.

[549] Turner v. Sawdon [1901] 2 K. B. 653; Turner v. Goldsmith [1891] 1 Q. B. 544.

[550] Borrowman v. Free, 4 Q. B. Div. 500.

but P cannot take advantage of any waiver for he has no claim on which damages can be predicted.[551]

§ 222. Any contract, not under seal, may be discharged by another contract rescinding it though oral.

If the first contract is bilateral, and still executory, mutual abandonment of their rights under it will be a sufficient consideration for the contract of rescission; but, if the contract is unilateral, or bilateral executed on one side, a new consideration will have to be found by one party. This rule does not apply to a rescission under seal where the seal is effective; and where there is a document of title, by a surrender of it, an executed gift may be made. Hence, it is seen, whether or not the result is happy, that the doctrine of consideration, not only applies to the formation of a valid contract but also to its discharge by act of the parties; but it has no application to the party who has the election to avoid the obligation of a voidable contract. Except in the case of contracts relating to land, the statute of frauds does not apply to contracts of rescission. Rescission by act of the court has been treated under "Remedies."[552]

§ 223. A contract may be discharged by substituting for it a new contract, either having none of the terms of the old contract or having some of the old terms and some new, or having a new party in place of one of the parties to the old contract.

The first is a complete substitution, the second, a modification, the third, novation. An assignment does not discharge a contract for the same contract continues, but, in novation there is a new contract which takes the place of the old, and the party supplanted is discharged from all liability. If the subject-matter is within the statute of frauds, the new as well as the old contract will have to conform to its requirements. If a contract is wholly executed it cannot be

[551] Gray v. Smith, 76 Fed. 525; Id. (C. C. A.) 83 Fed. 824.

[552] Coniers v. Holland, 2 Leon. 214; Flower's Case, Noy, 67; Langden v. Stokes, Cro. Car. 383; Edwards v. Weeks, 2 Mod. 259.

rescinded or have another substituted for it. The parties may place themselves in their original position but it will not only take a new contract to do so, but the fact that the contract accidentally deals with the same subject-matter does not make it a rescission. If a higher security is accepted for a lower, between the same parties and upon the same debt, as a specialty for a simple contract, the lower is presumed to be merged and extinguished in the higher.

ILLUSTRATIONS.

(1) D offers to guarantee the payment of goods P may sell to K, up to 200 pounds, and P sells H goods of the value of 190 pounds. Before any breach, a new contract is entered into extending the time of credit, for a promise of a joint note. This is a substituted contract, and discharges the old contract.[553]

(2) P, by a contract under seal, leases land to D, and one of the covenants in the lease is that D will yield up the premises at the end of the term, together with all improvements erected thereon. D assigns the lease to H and P agrees with H that if H will erect a greenhouse he may pull it down and remove it at the expiration of the term. As the contract under seal can be discharged only by an instrument of the same nature, the second agreement is of no effect and will be no defense to a suit for breach of covenant.[554]

(3) By a contract under seal, G promises to pay P $150,000 and one-fourth of the amount expended in the further construction of a certain railway from Pittsburg to Akron, through Newcastle. Owing to a sale of a part of the railway, the parties, in October, enter into a new agreement by which G is to pay $150,000 and one-fourth of the expense of construction from Newcastle to Akron, and on the original contract is indorsed: "It is agreed by the parties that the within contract is annulled by an agreement made in lieu thereof of date of October 25th," and this last agreement is fully carried out. Is the first contract, under seal discharged by the substitution of the new unsealed contract fully executed? Yes.[555]

(4) By a bill of sale, in the form of an indenture, P assigns to D a stock of goods, fixtures, etc., subject to a redemption in case P pays forty-two pounds by twenty-five consecutive weekly payments. On the day when the fourteenth payment becomes due, P asks D for a week's time and D says he may have it. Is this a discharge of his old obligation? No. There is no consideration for the new promise. Therefore, D may proceed, on the old contract, to seize the goods.[556]

[553] Taylor v. Hilary, 1 Cromp. M. & R. 741.

[554] West v. Blakeway, 2 Man. & G. 729.

[555] McCreery v. Day, 119 N. Y. 1, 23 N. E. 198.

[556] Williams v. Stern, 5 Q. B. Div. 409.

(5) W secures a judgment for $1,154 against E and A, co-partners. Thereafter, in consideration of $100 paid by E, W releases E from all liability and indorses this on the execution. A contends that this is a discharge of E and, therefore, discharges A as the other joint debtor. Is this a valid discharge? No. It is without consideration.[557]

(6) B owes A $200. In exchange for A's promise to discharge B, C promises to pay B's debt to A. This is a discharge of the first contract between B and A, by the new contract between C and A.[558]

(7) D promises to pay C and S 1,200 pounds, in six instalments, as certain work on buildings progresses, pays 872 pounds and then C and S give P an order on D for 200 pounds, for money to be earned on this contract. This is not a good novation, as no ascertained amount is yet due C and S, from D; but, if D owes C and S the balance of the 1,200 it will be, for when a specified amount is due from C and S to P and a larger sum from D to C and S, and all the parties agree that D shall be P's debtor instead of C and S, and D promises to pay P, this is a novation and C and S are discharged.[559]

§ 224. Contracts under seal, bills and notes, insurance policies and any other purely formal obligations, may be discharged by cancellation and surrender.

This is so because the document is not merely evidence of the obligation but is regarded as the obligation, and when the physical document is destroyed the obligation ceases. So, though a voluntary cancellation of any writing may not amount to rescission, yet, if it is the party's only legal evidence, it may prevent any suit.

ILLUSTRATIONS.

(1) Z signs a bond, agreeing to pay A the interest on $1,500 during the latter's lifetime. A dies and his executor and heir sues on the bond. A indorses on the bond that after his decease it shall be of no effect. Does this release it? No. There must be either a complete contract to rescind or a delivery. A, in his lifetime, delivers the bond to H, with directions to burn it, but H neglects to do this. Is the bond cancelled? Yes.[560]

(2) M holds a promissory note against P, but transfers the posses-

[557] Weber v. Couch, 134 Mass. 26.

[558] Roe v. Haugh, 12 Mod. 133; Trudeau v. Poutre, 165 Mass. 81, 42 N. E. 508.

[559] Fairlie v. Denton, 8 Barn. & C. 395; Gleason v. Fitzgerald, 105 Mich. 516, 63 N. W. 512.

[560] Albert's Ex'rs v. Ziegler's Ex'rs, 29 Pa. 50. See Cross v. Powel, Cro. Eliz. 483.

sion of it to him, without condition, intending it as a gift inter vivos. P subsequently returns it to M, but without an intent to revest the title. Is the note canceled? Yes. A gift of a note inter vivos or causa mortis may also be accomplished by destruction of the note animus donandi.[561]

§ 225. A contract embodied in a document is discharged by an intentional, material alteration, by addition or erasure by a party to the instrument or his agent, without the consent of the other party.

Of course, this rule applies only to executory contracts, for, if the obligation is already terminated by performance or any other discharge, there is nothing left to discharge by alteration. Aside from commercial paper, the loss of a written instrument only affects the rights of the parties, as it may occasion difficulty of proof, but if commercial paper indorsed in blank is lost before maturity, the owner loses his rights unless he offers indemnity to the party primarily liable.

ILLUSTRATIONS.

(1) A signs a note and delivers it to B who adds the words "with interest," or changes the amount payable, or inserts a name. Is the note discharged? Yes.[562]

(2) D signs a written guaranty which, while it is in P's hands without D's consent is altered by P by the addition of two seals, one after D's name and one after another party's. Is the obligation discharged? Yes. It is the duty of P to preserve the instrument in its original state. The addition of the seals gives a different legal character to the writing.[563]

§ 226. A contract is discharged and thereby one party is excused from further performance by breach on the part of the other party, either by repudiation, prevention, or failure of performance of a promissory condition, precedent, concurrent, or subsequent. A breach of independent promises, absolute, divisible, or subsidiary, does not discharge the contract.

[561] Marston v. Marston, 64 N. H. 146, 5 Atl. 713; Darland v. Taylor, 52 Iowa, 503, 3 N. W. 510.

[562] Pigot's Case, 11 Coke, 26 b; Meyer v. Huneke, 55 N. Y. 412.

[563] Davidson v. Cooper, 13 Mees. & W. 343.

By this wrongful act the contractual tie is loosed, and the parties are wholly freed from the antecedent rights under the contract, and henceforth, all that remain are the remedial rights to exoneration and to damages for breach and for benefits to which the party injured becomes at once entitled. So far as the discharge for breach of an implied condition is concerned, there is to be noted a distinction between breaches in limine, or before any part of the condition is performed, and breaches after part performance. The former discharge the contract, if material, while the latter discharge it only when they go to the essence of the contract. Discharge of contracts by the happening, or the not happening, of casual conditions precedent, concurrent and subsequent, as well as the remedial rights for the breach of promissory conditions, have already been discussed, and the circumstance that the discharge is brought about by the wrongful act of a party adds no new element, so far as the discharge of the contract is concerned. Independent promises may be absolute where the performance of one promise is not made to depend on the other; divisible, where a contract in one instrument is severable into distinct and independent contracts; subsidiary, where one undertaking of a party in a contract is not vital to the existence of the contract; but a breach of none of these independent promises will discharge the other party from his promise.

ILLUSTRATIONS.

(1) D agrees to sell and deliver, in one month, a quantity of corn, and P agrees to pay therefor a certain price. Can P sue for breach in not delivering the corn without showing readiness to pay? No. Where two concurrent acts are to be done the party who sues the other for nonperformance must aver that he has performed, or is ready to perform his part.[564]

(2) W agrees to deliver three loads of straw a fortnight, to R, till the 24th of June, for R's promise to pay therefor thirty-three shillings per load, for each load so delivered. In January R, who is in arrear, refuses to pay for one load, saying he is going to keep one load on hand unpaid. W then refuses to supply any more, unless paid for on delivery. Is W guilty of breach or is he discharged by R's refusal to pay on delivery? Payment and delivery are concurrent conditions, implied, and

[564] Morton v. Lamb, 7 Term R. 125.

by R's refusal to perform his own he has discharged W from his promise.[565]

(3) P agrees to convey an estate to D on or before the 2nd of September next and D agrees to then pay 210 pounds, or in default of execution, twenty-one pounds. P takes no steps towards conveying the estate. Can he sue for the 210 pounds? No. Performance of the duties devolving upon P is an implied condition concurrent with payment. D is not guilty of breach; neither, if D has not tendered payment within the agreed time, is P guilty of breach. Hence the contract is altogether discharged.[566]

(4) P promises to release, to D, his equity of redemption in certain mortgages in consideration of which D promises to pay P seven pounds. P executes a release which D pleads as a bar to a suit by P against D for the money promised. Is this a defense? No. The execution of the release is a condition concurrent (in early law precedent); until performed, P would have no cause of action and, after performed, it does not bar his action for the money promised.[567]

(5) A agrees to transfer stock six months later, and D in a separate instrument agrees to pay a certain amount therefor at that time. These are express concurrent conditions and each party must be ready to perform on the appointed day or he is guilty of breach.[568]

(6) D covenants to accept of P a certain amount of stock as soon as certain receipts are delivered, and to pay a specified amount therefor, on a particular date in the future on tender of stock. Is D guilty of breach before tender of stock? No. These are concurrent conditions.[569]

(7) By a charter party T agrees that his ship "being light, staunch and strong," etc., will go to a certain place to load a cargo of coal for G and proceed to other points, G agreeing to pay one-fourth of the freight in advance on the ship's sailing, and the balance at destination. The ship is not "light, staunch and strong," but G causes it to be loaded, and the cargo is lost at sea. Is T entitled to one-fourth of freight not paid? No. The condition that the ship shall be "light, staunch and strong" is waived, but T has not by the ship's sailing become entitled to the freight promised in advance. If the cargo is delivered at destination, T is entitled to full freight.[570]

(8) By written agreement, P agrees with S to sing a leading part in an opera so long as it shall run, beginning on the 28th of November, in consideration of S's promise to pay a stipulated salary and to engage her. On the 28th P is so sick S has to employ a substitute, whom he

[565] Withers v. Reynolds, 2 Barn. & Adol. 882.

[566] Goodisson v. Nunn, 4 Term R. 761.

[567] Thorp v. Thorp, 12 Mod. 455.

[568] Callonel v. Briggs, 1 Salk. 112.

[569] Lock v. Wright, 1 Strange, 569.

[570] Thompson v. Gillespy, 5 El. & Bl. 209.

engages permanently. On the 4th of December, P offers to take the part, but is refused. Is S guilty of breach of contract? No. These are implied concurrent conditions, and P's nonperformance of her promise discharges S from the performance of his. Neither is P guilty of breach of contract, for she is discharged from performance by the happening of a condition subsequent implied by law, sickness.[571]

(9) From a note of D, and a bond and receipt of P, it appears that they mutually agree within a reasonable time, concurrently, P to convey title to certain land and D to pay the purchase price. Neither party makes a tender of performance within that time. Therefore, both are discharged.[572]

(10) In writing, D agrees to pay P $396 payable in five equal annual instalments, for a deed to certain land, in consideration for which P agrees to execute a deed, conveying title to the land, upon payment of the last instalment. All the instalments have become due, and none of them paid. Can P recover any or all of the instalments without tendering a deed? No. Since the instalments are all due, it is not permitted the creditor to harass his debtor by a number of suits, and delivery of the deed is a condition concurrent with payment of the last instalment. If P should sue before the last instalment becomes due, he could recover as many of the other instalments as are then due, without offering to deed the title to the land, and some courts would allow a recovery to this extent, without tender, though the last instalment is due.[573]

(11) In a contract made under seal, P covenants that he is seized of a good title to certain lots and will convey the same to D for a certain price, but is given the right to mortgage them, in consideration of which D agrees to erect a house of a certain style, etc., on each lot, within seven months, and to take title and pay for the lots by a bond secured by mortgages, within eight months. On the same day P conveys the same premises, by warranty deed, to a third party. D fails to perform his promise. Is he excused? Yes. D has a right to rely on the personal responsibility of P, and his existing capacity to convey a good title. The covenants to convey and to execute mortgages are mutually dependent. Failure of P to keep his covenant good discharges D, but D can sue for breach. Not so, if a lien or incumbrance, is placed on the property.[574]

(12) D and S enter into an agreement, according to which D agrees to convey to S title to a certain farm on a certain day in the future, and

[571] Poussard v. Spiers, 1 Q. B. Div. 410.

[572] Hunt v. Livermore, 22 Mass. (5 Pick.) 395.

[573] Beecher v. Conradt, 13 N. Y. (3 Kern.) 108; Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362.

[574] James v. Burchell, 82 N. Y. 108; Ziehen v. Smith, 148 N. Y. 558, 42 N. E. 1080.

S agrees to pay therefor in cash and a conveyance of the title to another farm, the timber on the respective places to be valued by appraisers. D cuts the timber on his place, and S then refuses to go on with the contract. Is S guilty of breach? No. It is a condition subsequent implied that S shall not cut off the timber growing on the estate to be conveyed and thus change its character. S is discharged from further liability. The only breach is D's own. If loss is caused by accident it falls on the buyer or mortgagor, rather than seller or mortgagee.[575]

(13) In writing, C agrees to sell H a tract of land, and H agrees to pay therefor $700 in three certain instalments, the deed to be executed at the completing of the last payment. H pays the two first instalments. C does not tender any conveyance of the land. Is there a breach by H? No. The promises to pay the first two instalments are independent and absolute, but the promise to pay the last is dependent upon the execution of a deed, and a tender is necessary.[576]

(14) P promises to manufacture for D certain portions of a patented machine, upon bills for parts delivered being settled promptly, in order to prevent too large an amount of money being tied up in the work. A bill for $90 is not paid promptly, when about $700 is already due, and P refuses to do any more work. Is this failure by D a breach of contract? Yes. Under the circumstances of this case it is apparent that failure in prompt payment of a small item is a breach which goes to the whole of the contract, and it therefore, discharges P from further performance and also gives him a cause of action against D. This is a promissory condition subsequent.[577]

(15) P promises to ship D 667 tons of a certain kind of iron, in June, July August and September, about one-fourth each month. In June, instead of shipping about 100 tons, P ships only about twenty tons and is not ready to deliver the quantity specified to be delivered in June. D refuses to accept the twenty tons. Is D guilty of breach? No. P is guilty of a breach in not performing his promise according to its terms and that discharges D. P begins with a breach. Possibly, if in this case D should agree to furnish the ship and fail to do so during the first month, it would not amount to a breach of the whole contract, but P would be obliged to supply the other instalments, as it would not go to the essence of the contract.[578]

(16) W agrees to buy of N, and N agrees to sell 5,000 tons of T iron rails, at forty-five dollars a ton, to be shipped from a European port at the rate of 1,000 tons a month, beginning in February, the whole contract to be shipped before August. N ships 400 tons in February

[575] St. Albans v. Shore, 1 H. Bl. 270.

[576] Kane v. Hood, 30 Mass. (13 Pick.) 281.

[577] National Mach. & Tool Co. v. Standard Shoe Mach. Co., 181 Mass. 275, 63 N. E. 900.

[578] Hoare v. Rennie, 5 Hurl. & N. 19. But see Simpson v. Crippin, L. R. 8 Q. B. 14.

and W pays therefor, in ignorance that no more has been shipped. In March, N ships 885 tons, and W refuses to go on with the contract. Is N guilty of breach? Yes, and this breach discharges W from further obligation. A condition that shipment shall be at the rate of 1,000 tons a month is not performed by shipping 400 or 885. There is no waiver of this condition by keeping of 400, as W does not know the condition is broken.[579]

(17) R, of Illinois, agrees to sell M, of Pennsylvania, six carloads of corn at a certain price per bushel, to be delivered at a town in Pennsylvania, payments to be made when deliveries are made. One car arrives and also two drafts. M pays for the first draft. Another car arrives and M refuses to pay until the remaining cars arrive. R then notifies M that he rescinds the contract. Is either M or R guilty of breach? If M refuses to pay without sufficient reason and none appears, he is guilty of breach, and that authorizes R to rescind.[580]

(18) By a sealed contract, D agrees to erect a three-story business house, according to plans and specifications, by January 1st, 1869, P to pay therefor in instalments as the work progresses. In 1868 D has the building completed, when it falls, and in 1869 he has it almost completed again, when it falls, on account of the improper drainage of the subsoil, and then D refuses to go on with his contract. Is he liable for breach? Yes. The act is in itself possible and D must perform; but, if the performance is made impossible by the act or fault of the other party, that will excuse the promisor.[581]

(19) T apprentices his son to E, by an agreement in which the son undertakes to serve E for five years in his trades of auctioneer, appraiser and cornfactor, to learn his art, and E agrees to teach him. E stops being a cornfactor. The son leaves his work. Is T discharged from his promise by E's failure to continue the business of cornfactor? Yes. That E shall follow his trade is a condition precedent to T's obligation that the apprentice shall serve.[582]

(20) P agrees to sell D, and D agrees to buy, at a specified price, a certain quantity of wool, to be shipped from Odessa to either Liverpool, Hull, or London, the name of the vessels to be declared as soon as the wools are shipped. The parties contract with the knowledge that D intends to resell, but P does not notify D of the names of the vessels as soon as the wool is shipped. Is this a condition precedent, the breach of which by P discharges D? Yes. It is a condition inferred from the words used and the conduct of parties.[583]

(21) In an indenture, T demises certain premises to C, for the

[579] Norrington v. Wright, 115 U. S. 188.

[580] Rugg v. Moore, 110 Pa. 236, 1 Atl. 320.

[581] Stees v. Leonard, 20 Minn. 494 (Gil. 448); Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667.

[582] Ellen v. Topp, 6 Exch. 424.

[583] Graves v. Legg, 9 Exch. 709.

term of twenty-one years, for certain rent, and C covenants to keep the premises in good repair and return them in tenantable condition, T finding the timber for the repairs. The premises are not returned in tenantable condition. Can T hold C for breach of covenant, without first finding the timber? No. That is a condition precedent.[584]

(22) P agrees to do certain work for D, and D agrees to pay P, for his work, eight pounds. P sues D for breach of his promise, alleging that P is ready to perform, but neither alleging performance nor that he is prevented by D from performing. Can he recover? No. P's performance of the labor is a condition precedent to recovery on D's promise. The promises are not independent or even concurrent conditions, in which latter case the allegation would be appropriate.[585]

(23) P covenants to work for D for a year and a quarter, in consideration of D's covenants to pay him 200 pounds a year, and, at the end of the year, give up his business of a silk-mercer to P and another, upon P's giving sufficient security for the payment of the price of the business, to be approved by D. D refuses to give up the business to P, at the end of a year and a quarter, on the ground that P does not give sufficient security. Is he guilty of breach of contract? No. Giving sufficient security, to be approved by D, is an implied condition precedent, not concurrent. This doctrine of implied dependency was first clearly established in England, in 1773.[586]

(24) A agrees to sell to B, and B agrees to buy, A's title to a paper mill and the right to manufacture paper according to a certain process to be patented by A A agreeing to instruct B in the business, and in consideration for all these things B agrees to pay A $4,000 in annual instalments, in paper manufactured according to the above process. A fails to give B the right to manufacture by this process, and B refuses payment. The enjoyment of the right to use this art and process is regarded by the parties as a condition (therefore inferred) without the performance of which A is not bound to make the stipulated payments. If this had been an actual sale of the mill, the undertakings of A would have to be regarded as warranties, instead of conditions precedent.[587]

(25) P and D enter into an indenture by which D gives P a right to insure D's life, D to appear for examination at any insurance office in London and to do nothing to defeat such policy when issued to P. D, at P's request, goes to a certain office, and P takes out a policy in which is a condition making it void in case D goes beyond the limits of Europe. D goes to Canada, but P never gives him notice of the condition. The choice of the company and of the time of effecting insurance lie with P.

[584] Thomas v. Cadwallader, Willes, 496.

[585] Peeters v. Opie, 2 Wms. Saund. (pt. 2) 350; Nichols v. Raynbred, Hob. 88b.

[586] Kingston v. Preston, cited in 2 Doug. 689.

[587] Cadwell v. Blake, 72 Mass. (6 Gray) 402.

Is D guilty of breach of covenant? No. As D stipulates to do something within the peculiar knowledge of the other party, notice is an implied condition precedent to liability; failure to give which discharges D.[588]

(26) D, the lessor of premises, covenants with P, the lessee, to keep the main timbers and roofs of the buildings in repair. These get out of repair and D fails to repair them, but P gives D no notice of the condition of the timbers and roof. Is D guilty of breach of covenant? No. By implication his covenant is to repair on notice breach of which discharges D.[589]

(27) P agrees to deliver hay, to be cut on certain Big Meadows, to a United States Military Station near by, on or before a certain day, for a certain price promised. The government officials, before that day, hire other parties to cut the hay on this land, at increased expense, and P consequently fails to perform his contract. Is he discharged? Yes, by prevention; and he also has a claim for this breach of contract by the government.[590]

(28) In writing, B promises to deliver to H, at a designated place 25,000 pale brick for $3 per M, and 50,000 hard brick for $4 per M, cash. B delivers 10,500 pale and 10,500 hard brick, demands pay therefor and H refuses to pay until all the bricks are delivered. Is this a breach? No. The contract is entire and B is not entitled to any pay until all the bricks are delivered, that being a condition precedent.[591]

§ 227. The remedial rights of contract or quasi contract may be discharged by consent of the parties or by operation of law.

§ 228. A contractual remedy may be waived by a release under seal, executed by the injured party.

ILLUSTRATIONS.

(1) D is indebted to P and T and is unable to satisfy his debts, but it seems best to the creditors to allow D to carry on his business under the direction of T, for five years, and the parties enter into a contract, under seal, to this effect, and P and T covenant not to molest or interfere with D during that time, and provide that if they do D shall be released from all demands. In spite of the contract P sues D, within the five years. Is the contract a release which bars the action? Yes. This covenant inures as a release.[592]

[588] Vyse v. Wakefield, 6 Mees. & W. 442.

[589] Makin v. Watkinson, L. R. 6 Exch. 25; Hugall v. McLean, 53 Law T. (N. S.) 94.

[590] United States v. Peck, 102 U. S. 64. But see Blandford v. Andrews, Cro. Eliz. 694.

[591] Baker v. Higgins, 21 N. Y. 397.

[592] Gibbons v. Vouillon, 8 C. B. 483.

§ 229. An existing contractual remedial right is discharged upon the satisfaction of an accord, or at once upon making the contract if it is the intention of the parties to take the accord in satisfaction. An accord is a bilateral agreement where one party proposes to give and the other promises to accept a satisfaction in lieu of an existing remedial right.

This is the doctrine of accord and satisfaction. The reason why it is ordinarily said that accord (though in the form of a complete contract), without satisfaction, does not discharge the right of action is that the expression arose in connection with the discharge of tort actions before the origin of the bilateral contract, and it has persisted down to the present time. But a part payment, with nothing more, cannot be a good accord and satisfaction because there is no consideration for the promise of the creditor to forego. An accord may be defined as a bilateral contract by which a proposed satisfaction is offered and accepted.

ILLUSTRATIONS.

(1) P sues D, on two promissory notes one for 140 pounds, the other for 200 pounds, and D pleads that after the notes become due it is agreed between P and D and B, that B shall pay P 200 pounds by quarterly payments of six pounds, the causes of action of P to be suspended so long as B shall continue to make his payments. In spite of this P sues D, though B does not fail in making the quarterly payments. Is this a good accord and satisfaction? No. Construing the agreement according to the general intent of the parties, as learned therefrom, it means that P shall forbear suing until the quarterly payments cease. This does not suspend the right of action, in the meantime, but simply subjects P to an action for damages for breach of his agreement.[593]

(2) B covenants to repair a house for E, and is guilty of breach of covenant. E sues B and the latter pleads accord and satisfaction. Is this a good plea? Yes. It is not a discharge of the specialty but of the remedy for the breach of the specialty, and is therefore good even at the common law.[594]

(3) Creditors, pursuant to statutory authority, resolve that a certain composition shall be taken in satisfaction of debts due them from their

[593] Ford v. Beach, 11 Q. B. 852; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587.

[594] Blake's Case, 6 Coke, 43 b.

debtor. Can a creditor thereafter sue the debtor for the whole debt before default is made in payment of the composition? No. If a promise by the debtor is accepted as satisfaction, by the creditors, it is a discharge, but, if they agree to accept a composition, the debtor is not discharged unless he pays.[595]

(4) After a suit has been instituted against him by P, D agrees to give, and does execute a note for thirty dollars and agrees to pay certain costs, in settlement, and P gives D a receipt in full. Does this amount to a discharge of the old cause of action? Yes. This is an accord which operates at once as a discharge, as that clearly appears to have been the intention of the parties.[596]

(5) P obtains a judgment against D, for $4,334 and agrees to accept, in settlement thereof if paid within one year, $3,000 in cash and an assignment of a patent right, or $1,000 merchandise and the patent right estimated at $1,000. D elects the second alternative and does everything but transfer the patent right, the assignment of which P refuses when tendered. Can P collect the balance of the judgment? Yes. This is merely an accord, and the intention of the parties is not to take it as a satisfaction of the judgment.[597]

(6) P procures a judgment against F and H and T, his sureties. Then P agrees not to issue execution against T, but to look to the other defendants. Is H discharged? Not according to the early common law, for the agreement does not discharge T. It is not a release, and neither a debt of record nor a specialty can be discharged by an accord if this were such. Hence, at the common law, even payment could not be pleaded as a bar to an action on a debt of record. But this is no longer the law.[598]

(7) D owes P a large sum of money and sends him a check for less than the amount due with a receipt that this sum is accepted in full satisfaction, to be signed by P. P refuses to sign the receipt but keeps the check. Is this an accord and satisfaction? This is a question of fact, but the fact seems to be that P has not accepted the check in full satisfaction.[599]

(8) P and D are in dispute over a claim, D asserting that he owes eight dollars and forty-eight cents and P that he owes fifty-eight dollars and forty-eight cents. D sends to P a check for eight dollars and forty

[595] Slater v. Jones, L. R. 8 Exch. 186; Good v. Cheesman, 2 Barn & Adol. 328; In re Hatton, 7 Ch. App. 723.

[596] Babcock v. Hawkins, 23 Vt. 561. See Case v. Barber, T. Raym. 450; Allen v. Harris, 1 Ld. Raym. 122.

[597] Kromer v. Heim, 75 N. Y. 574.

[598] Mitchell v. Hawley, 4 Denio (N. Y.) 414; Steeds v. Steeds, 22 Q. B. Div. 537.

[599] Day v. McLea, 22 Q. B. Div. 610.

eight cents, with these words on the back of it: "Good only if indorsed in full of all demands to date against D". P crosses this out, without D's knowledge, and draws the money. Is this an accord and satisfaction? Yes. Payment of a less sum than is due, on an undisputed claim, does not bar a recovery for the balance; but here there is a disputed claim, and the offer of settlement has been accepted.[600]

(9) P, a driver, employed by the Adams Express Co., is injured, while transferring goods from a wagon to a freight car, and sues the Pennsylvania Railroad Co. This company pleads an accord and satisfaction, in that the express company is bound to see it harmless and in consideration of payment, to P, of wages, during a period of incapacity, P agrees to accept the same in full satisfaction. Both in England and America the late cases support a satisfaction moving from a third person.[601]

§ 230. A remedy ex contracto is discharged by arbitration and award if a claim is submitted to arbitration by lawful agreement of the parties and the arbitrators make an award, which substitutes a new debt for the original. Whether the award substitutes a new debt or merely fixes the amount due, if the award is performed, all remedial rights are discharged.

ILLUSTRATIONS.

(1) P sues D for payment for hops delivered, and D pleads that the matter has been submitted to J for arbitration by a certain day, and that before that day J has made an award that each party, or his executors and administrators, give the other a general release. Does this award bar the original remedy on the contract? No. As the arbitrator has awarded nothing in satisfaction, it creates no new duty.[602]

(2) In an action of indebitatus assumpsit by P for tolls D pleads that, differences as to the claim having arisen, they mutually submitted them to arbitration and promised to abide by the award, and the umpire awarded that D should pay P thirteen pounds, but does not allege payment of the award. Is the award alone a bar? No. Had the award varied the nature and character of the original demand, it would be, but as the money payable under the award is nothing but the original debt ascertained in amount, it is not; but if properly pleaded, it would be a bar to the recovery of anything over thirteen pounds.[603]

[600] Hull v. Johnson, 22 R. I. 66, 46 Atl. 182.

[601] Jackson v. Pennsylvania R. Co., 66 N. J. Law, 319, 49 Atl. 730.

[602] Freeman v. Bernard, 1 Ld. Raym. 247.

[603] Allen v. Milner, 2 Cromp. & J. 47; Commings v. Heard, L. R. 4 Q. B. 669; Williams v. London Commercial Exch. Co., 10 Exch. 569.

(3) P and D submit various claims, over which they are in dispute, to arbitrators. The latter pass on some of the items and announce their determination to the parties, but before passing on the other items, and before the award is signed, D delivers to the arbitrators a paper revoking their authority to proceed. Is the power created by the submission revoked? Yes. It may be revoked any time before the award. The first announcement is not an award because it does not decide all of the matters submitted.[604]

(4) P and G make a general submission to arbitration of all matters in dispute between them and an award is rendered. A claim which P has against D, for attaching his cow, in a suit by G against P, P does not submit to arbitration. Is the award a bar? No. D is not a party to the award.[605]

§ 231. Contract remedial rights are discharged by a judgment on the merits for or against the party. If in his favor, a quasi contract is created thereby and a remedy in quasi contract arises. If against him the principle res adjudicata applies and there can be maintained no other suit involving the same subject-matter.

When the suit results favorably, the judgment is called a contract of record and is the highest form of security. The old right of action for breach is merged in the judgment. The foundation of the principle res adjudicata is the prevention of the vexation of litigants and the giving necessary sanctity to the formal actions of the court.[606]

§ 232. A discharge in bankruptcy effects a statutory release from liability on contracts, or quasi contracts.

This is a bar to the remedy not to the obligation of a contract and it is established by law for the benefit of the individual debtor, and it may be waived by him by a new promise to pay his debt. This promise is required by some jurisdictions to be in writing.[607]

[604] Boston & L. R. Corp. v. Nashua & L. R. Corp., 139 Mass. 463, 31 N. E. 751.

[605] Robinson v. Hawkins, 38 Vt. 693.

[606] Higgens' Case, 6 Coke, 44b; Runnamaker v. Cordray, 54 Ill. 303; Bacon v. Reich, 121 Mich. 480, 80 N. W. 278.

[607] Reed v. Pierce, 36 Me. 455.

§ 233. Statutes generally bar the remedy for breach of contracts, or on quasi contracts, after the lapse of a prescribed period from the time the cause of action accrues.

This bar is also for the benefit of the individual debtor, and may be waived by any act or promise recognizing his former promise as binding as a part payment or acknowledgment, though in some jurisdictions this acknowledgment must be in writing. In like manner a person who has the right to avoid a voidable contract may waive the privilege and thereby give the other party a complete remedial right.[608]

§ 234. The states may not pass any law impairing the obligation of a true contract, express or inferred; but, so long as it is as efficacious as before, the remedy may be changed by the legislature unless the parties have specifically contracted for certain existing remedies. This inhibition does not apply to the United States.

Marriage, as a status, may be dissolved by divorce, and quasi contracts are not protected at all. Among the changes of remedy permitted are the following: Changing the statute of limitations; giving an additional remedy; repealing the right to a new trial as a matter of course, or providing for notice; and changing the rules of evidence; but not changing the amount of damages; or exemptions from levy and execution; or priority of liens.[609]

[608] Manchester v. Braedner, 107 N. Y. 346, 14 N. E. 405; Allen v. Collier, 70 Mo. 138.

[609] Sturges v. Crowninshield, 17 U. S. (4 Wheat.) 122; Walker v. Whitehead, 83 U. S. (16 Wall.) 314.

TABLE OF CASES.

A.

Abbott v. Doane, 114.
Ackert v. Barker, 134.
Adams v. Lindsell, 47.
v. Messinger, 196.
Albert's Ex'rs v. Ziegler's Ex'rs, 213.
Alexander v. Brogley, 61.
Allen v. Collier, 226.
v. Harris, 223.
v. Milner, 224.
Anchor Elec. Co. v. Hawkes, 141.
Anderson v. May, 206.
Anonymous, 17, 145, 146, 191.
Arkansas Valley Smelting Co. v. Belden Min. Co., 96.
Armory v. Delamirie, 3.
Armstrong v. Levan, 112.
Arnold v. Nichols, 35.
v. Richmond Iron Works, 90.
Asher v. Wallis, 12.
Atkins v. Hill, 109.
Atkinson v. Settree, 118.
Atwell v. Jenkins, 114.
Austin's Adm'x v. Whitlock's Ex's, 146.
Austin Real Estate & Abstract Co. v. Bahn, 118.
Averill v. Hedge, 50.

B.

Babcock v. Hawkins, 223.
Bachelder v. Fiske, 36.
Bacon v. Reich, 225.
Badger Silver Min. Co. v. Drake, 94.
Bagge v. Slade, 114.
Bailey v. Bussing, 24, 36.
v. Marshall, 151.
v. Sweeting, 163.
Baily v. De Crespigny, 206.
Bainbridge v. Firmstone, 113.
Baker v. Higgins, 221.
v. State, 3.
Baldey v. Parker, 159.
Baldwin Bros. v. Potter, 25.
Bank of Augusta v. Earle, 82.
Bank of Chillicothe v. Dodge, 21.
Bardwell v. Purrington, 83.
Barnard v. Simons, 118.
Barnes v. Hedley, 120, 131.
Barrett v. Buxton, 90.
Bartholomew v. Jackson, 11.
Bates v. Babcock, 156.
Batterbury v. Vyse, 203.
Beach v. First M. E. Church, 50.
Beckham v. Drake, 94.
Beckwith v. Talbot, 155.
Beecher v. Conradt, 217.
Beeler v. Young, 33.
Behn v. Burness, 64.
Bennett v. Smith, 84.
Benson v. Phipps, 118.
Bettini v. Gye, 191.
Bidder v. Bridges, 110.
Biggers v. Owen, 52.
Billings v. Inhabitants of Monmouth, 19.
Billington v. Cahill, 154.
Binnington v. Wallis, 120.
Birkley v. Presgrave, 37.
Bisbee v. McAllen, 126.
Bishop v. Eaton, 52.
Bissell v. Michigan Southern & Northern Indiana R. Cos., 19.
Blaisdell v. Ahern, 134.
Blake's Case, 222.
Blandford v. Andrews, 221.
Bonnel v. Foulke, 21.
Boone v. Eyre, 191.
Booth v. Eighmie, 151.

[References are to pages.]

Borrowman v. Free, 210.
Boston & L. R. Corp. v. Nashua & L. R. Corp., 225.
Boston Ice Co. v. Potter, 22, 62.
Bourkmire v. Darnell, 150.
Bowditch v. New England Ins. Co., 127.
Boyer v. Berryman, 90.
Breen v. Moran, 38.
Bridge v. Connecticut Mut. Life Ins. Co., 98.
Bright v. Boyd, 21.
British Waggon Co. v. Lea, 96.
Britton v. Turner, 29.
Brocas' Case, 191.
Brooks v. Ball, 114.
v. Haigh, 113.
v. Hamilton, 65.
Brown v. Hodgson, 12.
v. Pierce, 15, 74.
v. Woodbury, 17.
Buel v. Boughton, 10.
Buller v. Harrison, 25.
Burritt v. Saratoga County Mut. Fire Ins. Co., 65.
Butler v. Baker, 147.
Butterfield v. Byron, 219.
Byrne v. Van Tienhoven, 48.

C.

Cadwell v. Blake, 220.
Cahen v. Platt, 192.
Cahill v. Hall, 28.
Callisher v. Bischoffsheim, 116.
Callonel v. Briggs, 216.
Carr v. Jackson, 94, 95.
Case v. Barber, 223.
Cator v. Burke, 99.
Cavanaugh v. Jackson, 157.
Chalmers, Ex parte, 205.
Chandler v. Sanger, 15.
Chapin v. Shafer, 85.
Chapman v. Shattuck, 98.
Chapple v. Cooper, 33.
Cherry v. Heming, 154.
Chicago & G. E. R. Co. v. Dane, 117.
Christie v. Borelly, 193.
Church v. Proctor, 142.
Clark v. Manchester, 29.
v. Marsiglia, 198.
v. Pease, 76.
v. Pinney, 14.
Clarke v. Watson, 203.
Clarksville Land Co. v. Harriman, 207.
Clifford v. Watts, 206.
Cohen v. New York Mut. Life Ins. Co., 92.
Colby v. Dearborn, 179.
Collen v. Wright, 38, 95.
Collier v. Coates, 10.
Collins v. Locke, 141.
Commings v. Heard, 224.
Coniers v. Holland, 211.
Conrad v. Lane, 32.
Constable v. Cloberie, 208.
Cook v. Lum, 100.
v. Wright, 116.
Cooke v. Oxley, 49.
Coombe v. Greene, 204.
Cope v. Rowlands, 126.
Corrigan v. Pironi, 79.
Cort v. Ambergate N. & B. & E. J. R. Co., 188.
v. Lassard, 196.
Coursolle v. Weyerhauser, 87.
Cowan v. Milbourn, 128.
Cowley v. Patch, 102.
Cross v. Powel, 213.
Crouch v. Martin, 99.
Crowther v. Farrer, 119.
Croyle v. Moses, 69.
Cummings v. Arnold, 163.
Cundy v. Lindsay, 62.
Cusack v. Robinson, 161.

D.

Daimouth v. Bennett, 24.
Dale v. Sollet, 27.

[References are to pages.]

Daniels v. Newton, 189.
Darland v. Taylor, 214.
Davidson v. Cooper, 214.
Davis v. Old Colony R. Co., 82.
Davison v. Von Lingen, 64.
Dawe v. Morris, 70.
Dawson v. Linton, 12.
Day v. Caton, 45, 54.
v. McLea, 223.
v. New York Cent. R. Co., 20.
Deering v. Winchelsea, 36.
Deputy v. Staplefford, 75.
Derby v. Phelps, 154.
Devecmon v. Shaw, 114.
Dewey v. Alpena School Dist., 206.
De Wutz v. Hendricks, 131.
Dickinson v. Dodds, 49.
Dietrich v. Hoefelmeir, 154.
Dingley v. Oler, 189.
Doherty v. Hill, 158.
Doll v. Noble, 204.
Donahue v. Donahue, 31.
Donnelly v. Currie Hardware Co., 44.
Dougherty v. Catlett, 157.
Dowling v. McKenney, 11.
Downing v. Stone, 88.
Doyle v. Dixon, 154.
Drew v. Nunn, 50.
Dunlop v. Higgins, 57.
Dunphy v. Ryan, 157.
Dunton v. Dunton, 115.
Durnherr v. Rau, 35.
Dusenbury v. Hoyt, 112.
D'Utricht v. Melchor, 20.
Dutton v. Poole, 35.
Duval v. Wellman, 24.

E.

Eames v. Preston, 146.
Eddy v. Davis, 217.
Edge v. Boileau, 190.
Edgemoor Bridge Works v. County of Bristol, 45.
Edmond's Case, 112.
Edwards v. Weeks, 211.
Eichholz v. Bannister, 38.
Eliason v. Henshaw, 54.
Ellen v. Topp, 219.
Emery v. Ohio Candle Co., 139.
Emley v. Perrine, 100.
Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 207.
England v. Davidson, 111.
Erkens v. Nicolin, 23.
Esposito v. Bowden, 131.
Evans v. Hoare, 154.

F.

Fairlie v. Denton, 213.
Fashion v. Atwood, 99.
Ferguson v. Coleman, 130.
Ferrand v. Bischoffsheim, 95.
Fink v. Smith, 113.
First Nat. Bank v. Bryan, 74.
First Nat. Bank of Nashua v. Van Vooris, 5.
Fisher v. Seltzer, 47.
Fitch v. Snedaker, 46.
Flight v. Bolland, 87, 196.
Flower v. Sadler, 135.
Flower's Case, 211.
Foakes v. Beer, 110.
Ford v. Beach, 222.
Foshay v. Ferguson, 73.
Foster v. Mackinnon, 61.
Fowler v. Callan, 134.
Fox v. Rogers, 127.
v. Tabel, 95.
Francisco Gargulio, The, 34.
Frazier v. Harvey, 38.
Freeman v. Bernard, 224.
Freeth v. Burr, 192.
Frost v. Gage, 125.
v. Knight, 189.
Funk v. Hough, 46.

G.

Gaffney v. Hayden, 19.
Gammons v. Johnson, 135.

[References are to pages.]

Ganson v. Madigan, 180.
Garst v. Harris, 141.
Gay v. Ballou, 32.
Gibbons v. Vouillon, 221.
Gibbs v. Smith, 125.
Gibson v. Holland, 163.
Gillingham v. Brown, 113.
Gleason v. Fitzgerald, 213.
Globe Mut. Life Ins. Ass'n v. Wagner, 209.
Goddard v. Binney, 160.
Good v. Cheesman, 223.
Goodisson v. Nunn, 216.
Goodsell v. Meyers, 87.
Gordon v. Bruner, 5.
Gorham's Adm'r v. Meacham's Adm'r, 82.
Graham v. Burch, 77.
Grant v. Easton, 39.
v. Porter, 112.
Graves v. Johnson, 124.
v. Legg, 219.
Gray v. Gardner, 204.
v. Smith, 211.
Great Northern R. Co. v. Witham, 51, 117.
Green v. Gilbert, 18.
Green Bay & M. Canal Co. v. Hewitt, 185.
Greenwood v. Law, 160.
Gregory v. Lee, 33.
Gribben v. Maxwell, 89.
Griswold v. Bragg, 21.
Guernsey v. Cook, 124.
Guild v. Conrad, 151.
Guilleaume v. Rowe, 73.
Guthrie v. Murphy, 32.

H.

Hadley v. Baxendale, 197.
Haigh v. Brooks, 113.
Hale v. Spaulding, 102.
Hall v. Perkins, 78.
Hamer v. Sidway, 115.
Hamlin v. Tucker, 173.
Hampden v. Walsh, 25, 129.
Hanauer v. Woodruff, 131.
Hanks v. Naglee, 137.
Hanover Nat. Bank v. Blake, 125.
Haus v. Louisiana, 82.
Harding v. Harding, 99.
Harris v. Carmody, 74.
v. Tyson, 67.
Harrison v. Cage, 117.
Harvey v. Merrill, 130.
Hatch v. Standard Oil Co., 3.
Hatton, In re, 223.
Hawkins v. Graham, 204.
Hayden v. Bradley, 192.
Hayes v. Jackson, 158.
Haynes v. Second Baptist Church, 18.
Head v. Porter, 5, 11.
Heaven v. Pender, 37.
Helm v. Wilson, 15.
Henderson v. Folkestone Waterworks Co., 23.
v. Fox, 33.
Henry v. Root, 87.
Henthorn v. Fraser, 56.
Herbert v. Bronson, 100.
Herreshoff v. Boutineau, 141.
Herring v. Dorell, 115.
Herter v. Mullen, 207.
Hewitt v. Anderson, 52.
Heywood v. Perrin, 182.
Hickam v. Hickam, 12.
Hickman v. Haynes, 163.
Higgens' Case, 225.
Higgins v. Breen, 12.
Hill v. Anderson, 27.
Hirth v. Graham, 156.
Hoare v. Rennie, 218.
Hobbs v. Massasoit Whip Co., 11.
Hochster v. De La Tour, 188.
Holcomb v. Weaver, 125.
Holman v. Johnson, 123.
Holt v. Ward Clarencieux, 117.
Hopkins v. O'Kane, 129.
Hough's Adm'rs v. Hunt, 78.
Household Fire & Carriage Acc. Ins. Co. v. Grant, 55.

[References are to pages.]

Howell v. Coupland, 206.
Hucklesby v. Hook, 157.
Huffman v. Hughlett, 30.
Hugall v. McLean, 221.
Hull v. Johnson, 224.
Humphrey v. Merriam, 72.
Hunnewell v. Duxbury, 71.
Hunt v. Brown, 222.
v. Hunt, 152.
v. Livermore, 217.
Hutley v. Hutley, 134.
Hyde v. Goodnow, 185.
v. Wrench, 50.

I.

Ilsley v. Jewett, 112.
Inhabitants of Whitefield v. Longfellow, 74.
Isle Royal Min. Co. v. Hertin, 21.

J.

Jack v. Fiddes, 14.
Jackson v. Pennsylvania R. Co., 224.
v. Rogers, 37.
Jacobson v. Miller, 173.
James v. Burchell, 217.
v. Cavit's Adm'r, 23.
v. City of Newton, 99.
Jell v. Douglas, 101.
Jenkins v. Pye, 77.
Jewett Pub. Co. v. Butler, 125.
Joannin v. Ogilvie, 15.
Joest v. Williams, 90.
Johnson v. Dodge, 156.
v. Northwestern Mut. Life Ins. Co., 86.
Johnson's Adm'r v. Hunt, 138.
Johnston v. Commercial Bank, 25.
Johnstone v. Milling, 189.
Johnstone v. Young, 191.
Jones v. Ashburnham, 118.
v. Judd, 18.
v. Pope, 5.
Jones Bros. v. Joyner, 162.
Jordan v. Dobbins, 50.

K.

Kadish v. Young, 198.
Kane v. Hood, 218.
Keightley v. Watson, 103.
Keith v. Miles, 111.
Kellogg v. Adams, 3.
Kelly v. Solari, 25.
Kelner v. Baxter, 95.
Kendall v. Hamilton, 102.
King v. Brown, 20.
v. Duluth, M. & N. R. Co., 111.
v. Hoare, 101.
v. King, 138.
Kingston v. Preston, 220.
Kirkman v. Phillips' Heirs, 13.
Kitchin v. Campbell, 30.
Krell v. Codman, 145.
Kromer v. Heim, 223.
Kullman v. Greenebaum, 125.
Kyle v. Kavanaugh, 63.

L.

Lacy v. Getman, 206.
Laidlaw v. Organ, 67.
Laird v. Pim, 198.
Lakeman v. Pollard, 206.
Lancaster County Nat. Bank v. Moore, 89.
Langden v. Stokes, 211.
Lantz v. Frey, 31.
Lattimore v. Harsen, 110.
Lavery v. Pursell, 156.
Leavitt v. Fletcher, 193.
Lee v. Gaskell, 156.
v. Griffin, 160.
v. Muggeridge, 120.
Lerned v. Wannemacher, 163.
Lewis v. Browning, 54.
v. Jewell, 72.
v. Nicholdson, 95.
Lightly v. Clouston, 13.
Lingenfelder v. Wainwright Brew. Co., 111.

[References are to pages.]

Littlefield v. Shee, 109.
Liverpool & L. & G. Ins. Co. v. Kearney, 208.
Livingston v. Ralli, 136.
v. Ten Broeck, 183.
Lloyd v. Lee, 115.
Lock v. Wright, 216.
London & Northern Bank, In re, 48.
London & P. Ins. Co. v. Seymour, 195.
Long v. White, 156.
Longridge v. Dorville, 115.
Lorah v. Nissley, 146.
Loring v. City of Boston, 50.
Louisiana v. Wood, 82.
Lumley v. Wagner, 196.
Lynn v. Bruce, 119.

M.

McClurg v. Terry, 58.
McCreery v. Day, 212.
MacGreal v. Taylor, 86.
McKnight v. Bell, 157.
McMillan v. Vanderlip, 29.
Mactier's Adm'rs v. Frith, 55, 56.
Main's Case, Sir Anthony, 189.
Makin v. Watkinson, 221.
Maloney v. Nelson, 124, 136.
Manchester v. Braedner, 226.
March v. Ward, 103.
Marsh v. Pier, 30.
Marston v. Marston, 214.
Martin v. Crump, 102.
v. Meles, 117.
Mathews v. Phelps, 183.
Mayer v. City of New York, 21.
Meguire v. Corwine, 132.
Meigs v. Dexter, 147.
Merchants Ins. Co. v. Abbott, 26.
Merrill v. Peaslee, 138.
Merryweather v. Nixan, 24.
Mersey Steel & Iron Co. v. Naylor Benzon & Co., 192.
Merwin v. Arbuckle, 71.
Meyer v. Hartman, 151.
v. Huneke, 214.
Miles v. New Zealand Alford Estate Co., 119.
v. Schmidt, 136.
Milford v. Com., 34.
Miller v. Lea, 95
v. Miller, 30.
v. Smith, 86.
Mills v. Wyman, 109.
Millward v. Littlewood, 137.
Miner v. Bradley, 17.
Minneapolis & St. L. Ry. v. Columbus Rolling Mill, 51.
Mitchell v. Hawley, 223.
v. Reynolds, 140.
Molton v. Camroux, 89.
Moody v. Amazon Ins. Co., 205.
Mooney v. Miller, 69.
Moore v. Elmer, 109.
More v. Bennett, 139.
Morgan v. Birnie, 202.
Morrisey, In re, 83.
Morton v. Lamb, 215.
Moulton v. Kershaw, 45.
Mowatt v. Wright, 23.
Mulvey v. King, 66.
Munroe v. Perkins, 110.

N.

Nash v. Armstrong, 120.
v. Towne, 94.
National Bank & Loan Co. v. Petrie, 126.
National Mach. & Tool Co. v. Standard Shoe Mach. Co., 218.
Newall v. Tomlinson, 18.
New York Cent. R. Co. v. Lockwood, 138.
Nicholdson v. Chapman, 11.
Nichols v. Mudgett, 133.
v. Raynbred, 220.
Nickelson v. Wilson, 136.
Noble v. Ward, 163.
Noice v. Brown, 138.

[References are to pages.]

Nolan v. Whitney, 203.
Nordenfeldt v. Maxim Nordenfeldt Gun & Ammunition Co., 141.
Norrington v. Wright, 219.
Nugent v. Wolfe, 151.
Nyulasy v. Rowan, 47.

O.

O'Connell v. Mt. Holyoke College, 152.
Odell v. Webendorfer, 154.
O'Donnell v. Leeman, 179.
Offord v. Davies, 47.
Ollive v. Booker, 204.
Ormund v. Hobart, 131.
Oshorn v. Governors of Guy's Hospital, 22.
v. Martha's Vineyard R. Co., 102.
Oxendale v. Wetherell, 16.

P.

Paget v. Marshall, 195.
Paige v. O'Neal, 26.
Parish v. Wheeler, 19.
Parker v. Macomber, 18.
v. Russell, 198.
Parsons v. Loucks, 160.
v. Phelan, 157.
Patterson v. Patterson, 12.
Payne v. Cave, 48.
Pead v. Trull, 210.
Pearce v. Brooks, 137.
Peerce v. Kitzmiller, 39.
Peeters v. Opie, 220.
Pellman v. Hart, 100.
People v. Globe Mut. Life Ins. Co., 207.
Peter v. Compton, 153.
Petty v. Brunswick & W. R. Co., 72.
Peuson v. Higbed, 97.
Philadelphia, City of v. Reeves, 101.
Phillips v. Moor, 57.
Phoenix Life Ins. Co. v. Raddin, 66.
Pigot's Case, 214.
Pinches v. Swedish Evangelical Lutheran Church, 16.
Pixley v. Boynton, 130.
Platt v. Bromage, 10.
Pool v. City of Boston, 111.
Pordage v. Cole, 191.
Poussard v. Spiers, 217.
Presbyterian Church of Albany v. Cooper, 109.
Prescott v. Jones, 53.
Price v. Barker, 103.
v. Neal, 25, 26.
Provident Life Ins. & Inv. Co. v. Baum, 36.

R.

Raffles v. Wichelhaus, 62.
Raybourn v. Comstock, 188.
Reed v. City of Muscatine, 173.
v. Merchants Mut. Ins. Co., 183.
v. Pierce, 225.
Reif v. Paige, 45, 54.
Reina v. Cross, 16.
Resseter v. Waterman, 151.
Reynolds v. Robinson, 180.
Richards v. Green, 87.
v. Heather, 101.
Richardson v. Duncan, 14.
Riggs v. Bullingham, 108.
Rindge v. Kimball, 112.
Ripley v. M'Clure, 188.
Roberts v. Security Co., 147.
Robertson v. Davenport, 194.
Robinson v. Cumming, 22.
v. Gould, 74.
v. Hawkins, 225.
Roe v. Haugh, 213.
Rommel v. Wingate, 20.
Roscorla v. Thomas, 109.
Rose v. Spies, 11.
Rosenbaum v. United States Credit System Co., 127.
Roszell v. Roszell, 195.

[References are to pages.]

Row v. Dawson, 99.
Royal Ins. Co. v. Beatty, 53.
Rugg v. Moore, 219.
Runnamaker v. Cordray, 225.
Rupley v. Daggett, 43.
Ryan v. Price, 78.
Ryder v. Wombwell, 33.

S.

St. Albans v. Shore, 218.
Salmon Falls Mfg. Co. v. Goddard, 162.
Sanders v. Pottlitzer Bros. Fruit Co., 43.
Saunders v. Saunders, 146.
Sceva v. True, 4.
Schmaltz v. Avery, 95.
Schnell v. Nell, 108.
Schommer v. Farwell, 73.
School Directors of Union Dist. No. 2 v. Boomhour, 71.
Schuler v. Myton, 113.
Scotson v. Pegg, 118.
Scott v. Avery, 136.
v. Brown, 125.
Sears v. Eastern R. Co., 48.
Second Nat. Bank v. Grand Lodge of F. & A. A. M., 35.
Seidenbender v. Charles' Adm'rs, 131.
Semmes v. Hartford Ins. Co., 205.
Seward v. Mitchell, 118.
Seymour v. Armstrong, 52.
Shadforth v. Higgin, 202.
Shales v. Seignoret, 197.
Sharington v. Strotton, 145.
Shelton v. Ellis, 63.
Sherman v. Kitsmiller, 57.
Shipman v. Horton, 85.
Shuey v. United States, 49.
Simpson v. Crippin, 218.
Sir Anthony Main's Case, 189.
Slater v. Jones, 223.
Slater Woollen Co. v. Lamb, 19.
Small v. Chicago, R. I. & P. R. Co., 135.
Smith v. Monteith, 116.
Soutier v. Kellerman, 180.
Spaids v. Barrett, 75.
Spalding v. Rosa, 206.
Spencer v. Harding, 44.
Spencer & Newbold's Appeal, 14, 67.
Spooner v. Mattoon, 38.
Stark v. Parker, 29.
Starr v. Bennett, 69.
State v. Shevlin-Carpenter Co., 21.
State Trust Co. v. Sheldon, 112.
Stearns v. Sweet, 182.
Steeds v. Steeds, 223.
Stees v. Leonard, 219.
Sterling v. Sinnickson, 138.
Stevens v. Ludlum, 71.
Stevenson v. McLean, 51.
Stewart v. Thayer, 128.
Stone v. Bale, 146.
v. Wilbern, 89.
Story v. Lovett, 179.
Straton v. Rastall, 9.
Streeper v. Williams, 185, 197.
Strong v. Sheffield, 119.
Sturges v. Crowninshield, 226.
Sutton v. Grey, 152.
Swires v. Parsons, 31.

T.

Tanner v. Merrill, 115.
Taunton v. Pepler, 145.
Taylor v. Merchants Fire Ins. Co., 53.
Taylor v. Brewer, 57.
v. Carpenter, 92.
v. Hilary, 212.
Thacker v. Hardy, 129.
Thomas v. Cadwallader, 220.
v. Hartshorne, 207.
v. Thomas, 117.

[References are to pages.]

Thompson v. Gillespy, 216.
v. Gould, 17.
v. Reynolds, 134.
Thorp v. Thorp, 216.
Thurnell v. Balbirnie, 203.
Thurston v. Arnold, 185.
Tillock v. Webb, 128.
Tinn v. Hoffmann, 44, 49.
Towers v. Barrett, 16.
Tracy v. Keith, 91.
Trainer v. Trumbull, 32.
Traver v. ———, 114.
Trist v. Child, 132.
Trower v. Elder, 185.
Trudeau v. Poutre, 213.
Trueblood v. Trueblood, 84.
Trueman v. Fenton, 112.
Tucker's Lessee v. Moreland, 84, 90.
Tullis v. Jacson, 203.
Turner v. Goldsmith, 210.
v. Robinson, 29.
v. Sawdon, 210.
v. Webster, 27.
Tutt v. Ide, 13.
Tweddle v. Atkinson, 35.

U.

United States v. Grossmayer, 92.
v. Peck, 221.

V.

Van Deusen v. Blum, 18.
Vent v. Osgood, 19.
Vitty v. Eley, 52.
Vyse v. Wakefield, 221.

W.

Waiden v. Louisiana Ins. Co., 66.
Walker v. Ebert, 61.
v. Nussey, 161.
v. Whitehead, 226.
Walter v. Victor G. Bloede Co., 163.
Warner v. Texas & P. R. Co., 153.
Warren v. Hodge, 110.
v. Lynch, 145.
Watkins v. Baird, 73.
Watson v. Turner, 109.
Waugh v. Morris, 127.
Way v. Sperry, 112.
Weber v. Couch, 213.
Welch v. Bunce, 85
v. Mandeville, 98.
Wells v. Alexandre, 58.
v. Calnan, 205.
v. Caywood, 91.
West v. Blakeway, 212.
Western Assur. Co. v. Towle, 27.
Wheat v. Cross, 48, 57.
Wheeden v. Fiske, 15.
Wheeler v. Klaholt, 54.
White v. Bluett, 58.
v. Corlies, 53.
v. Franklin Bank, 24.
v. Middlesex R. Co., 136.
Whitefield, Inhabitants of v. Longfellow, 74.
Wickiser v. Cook, 13, 66, 77.
Wilbur v. Gilmore, 31.
Wilcox v. Iowa Wesleyan University, 67.
Wilder v. Cowles, 94.
Wilkinson v. Oliveira, 113.
Williams v. Bayley, 135.
v. Carwardine, 46, 52.
v. Gibbes, 21.
v. Jones, 39.
v. London Commercial Exch. Co., 224.
v. Stern, 212.
v. West Chicago, St. R. Co., 46.
Winch v. Keeley, 97.
Winchester v. Howard, 95.
v. Nutter, 130.
Withers v. Reynolds, 216.
Wolcott v. Mount, 197.
Wolfe v. Howes, 18.
Wood v. Moriarty, 35, 180.
Woods v. Ayres, 5.

[References are to pages.]

Woodstock Iron Co. v. Richmond & Danville Extension Co., 133.
Work v. Beach, 204.
Worsley v. Wood, 202.
Wright v. Dannah, 162.

Y.

Youn v. Lamont, 90.
Young v. Cole, 16.

Z.

Ziehen v. Smith, 217.
Zuck v. McClure, 189.

INDEX.

[References are to pages.]

A.

ACCEPTANCE—
definition of, 51-52.
by act, 52-53.
by promise, 52-53.
by silence, 53.
communication of, 52-54.
revocation of, 56.
effect of, 56-57.
in unilateral and bilateral contracts, 52-54.
manner of, 53-54.
time of, 55-56.
by post, 55.
by telegraph, 56.
failure to receive, 57.
of benefits, 9-33.
of deed, 52-53.
relation to consideration, 107, 157, 158.
counter-offer not, 50.
after rejection of offer, 51.

ACCEPTANCE AND RECEIPT—
as used in statute of frauds, 160-161.

ACCESSORY CONTRACTS—
defined, 177.
subject-matter of, 177.

ACCORD AND SATISFACTION—
defined, 222.
as consideration, 104.
discharge of remedy by, 194, 222-224.

ACT—
as legal right or obligation, 3.
as acceptance, 5, 52.
as offer, 45.
voluntary, 22-23.

ACT OF GOD—
ground for recovery in quasi contract, 17-18.

ACTIONS—
history of, 40-43.
debt, 38, 41.

[References are to pages.]

covenant, 41-42.
assumpsit, 42-43.
quantum meruit, 12, 15, 17-21.
quantum valebat, 13, 15-21.
indebitatus assumpsit, 13.

ADDITIONAL COMPENSATION—
promise to pay, 110-111.

ADDRESSEE—
defined, 46.
authority of, 56.

ADJECTIVE LAW—
defined, 2.

ADMINISTRATION OF JUSTICE—
agreements interfering with, 133-136.

ADVERTISEMENTS—
as offers, 44-45.

AGENCY—
subject-matter of, 176.
creation of, 93.
relation of to contracts generally, 93.

AGENTS—
agency known, 93-94.
agency unknown, 94.
authorized, 93-94.
unauthorized, 95.
general, 93.
special, 93.

AGREEMENT—
definition of, 5.
created by offer and acceptance, 5, 43-44.
reality of, 59-60.
obligation of, 5-7.
preliminary, 43-44.
void, 6, 63, 83, 89, 172.
formal, 143-164.
formless, 144, 164.
within statute of frauds, 148-164.

ALIENS—
definition of, 91-92.
contractual capacity of, 91-92.
dealings with, 131.

[References are to pages.]

ANTICIPATORY BREACH OF CONTRACT, 187-189.

ARBITRATION—
agreements to submit to, 133, 136.

ARBITRATION AND AWARD—
discharge of remedy by, 224-225.

ASSIGNMENT OF CONTRACTS—
by promisor, 95-96.
by promisee, 96-98.
at common law, 96-98.
in equity, 98-99.
under statute, 99-100.
personal contracts, 96, 98.
assignment of liabilities, 98.
partial assignment, 98.
assignment of copyrights and patents, 164.
notice to the debtor, 98-99.
what passes by assignment, 96, 99.
distinguished from negotiability, 99.
by operation of law, 96-97.

ASSUMPSIT—
action in contracts, 42-43.
action in quasi contracts, 10, 43, 144.
action in torts, 42.

ATTORNEYS—
contracts with, 76-77.
practicing without license, 126.
champertous agreements of, 133-135.

B.

BAILMENT CONTRACT—
definition of, 175.
subject-matter of, 175.

BANKRUPTCY—
discharge of remedy by, 225.
waiver of defense of, 108, 112, 163.

BENEFICIARY—
right to enforce contracts, 34-35, 92-93, 109.

BENEFITS—
doctrine of, in quasi contracts, 9-33, 40-41.
no longer consideration for contracts, 42-43, 113.

[References are to pages.]

BILATERAL CONTRACTS—
definition of, 166.
distinguished, 5, 45, 166-167, 171.
consideration in, 42, 104-107, 116-120.
acceptance in, 52.
dependency in, 168-172.
breach of, 186-187.
discharge of, 207-211.

BILLS OF EXCHANGE—
must be in writing, 147.

BREACH OF CONTRACT—
a legal wrong, 186-187.
by repudiation, 186-189.
by prevention, 186-187, 189.
by failure to perform, 186, 190-193.
by promisor, 186-187, 189.
by promisee, 186-187, 189.
before performance is due, 187.
in limine, 215.
in course of performance, 187.
of promissory conditions, 189-193, 214-221.
of independent promises, 190-193, 215.
damages in case of, 196-198.
discharge by, 214-221.
anticipatory, 187-189.
going to the essence, 187, 191, 215.
ground for recovery in quasi contract, 17.

C.

CANCELLATION AND SURRENDER—
discharge of contract by, 213-214.

CAPACITY—
of parties, 81-92.

CASUAL CONDITIONS—
definition of, 168-169, 201.
classification of, 168-172.
precedent, 168-169, 202-204.
subsequent, 168-169, 204-207.
express, 168-172, 203.
implied, 168-172.
discharge of contracts by, 201-207.
waiver of, 194, 202, 216.

[References are to pages.]

CAVEAT EMPTOR, 64.

CERTAINTY AND UNCERTAINTY, 57-58.

CHAMPERTY—
meaning of, 133.
agreements affected with, 133-135.

CHANGE OF POSITION—
as affecting recovery in quasi contract, 25.

CHARITY—
works of, 128.

CHARTER PARTIES—
conditions in, 171.

CHECKS—
as consideration, 110.

CIRCULARS—
as offers, 44-45.

CLASSIFICATION OF CONTRACTS—
as to form, 165-168.
as to performance, 165, 168-172.
as to validity, 165, 172.
as to subject-matter, 165, 172-177.

COMBINATIONS. (See Restraint of Trade.)

COMPOSITIONS WITH CREDITORS—
when fraudulent, 124-125.
as consideration, 104.
discharge of remedy by, 222-223.

COMPOUNDING FELONY, 133.

COMPROMISES—
when valid consideration, 104, 108, 114-115.

CONDITIONAL CONTRACT—
definition of, 168.

CONDITIONS—
defined, 168-169.
classification of, 168-172.
distinguished from representations made to induce contract and from warranties, 64.

[References are to pages.]

precedent, 168-172, 190, 201-208, 220-221.
concurrent, 168-172, 190, 209-211, 214-220.
subsequent, 168-172, 190, 201-208, 214, 218-220.
casual, 168-172, 190, 201-207.
promissory, 168-172, 190-193, 205, 208-211, 214-221.
ground for recovery in quasi contract, 16-17.
affecting formation and obligation of contract, 168.
suspending and discharging contracts, 168-172, 201-207.
express and implied, 168-172, 215-221.
distinguished from independent promises, 168-172, 190.
mutual dependency, 168-172, 214-220.
performance of, 168-172, 208-211.
waiver of, 190-191, 207-208.
breach of, 190-193, 214-221.
discharge of contracts by, 201-207.

CONFIDENTIAL RELATIONS—
what are, 65, 76-77.
misrepresentations in, 65-66.
undue influence in, 76-77.

CONFLICT OF LAWS, 185.

CONNECTED WRITINGS—
under statute of frauds, 148, 157-158, 162-163.

CONSENSUAL THEORY OF CONTRACTS, 42-43.

CONSIDERATION—
definition of, 104-105.
a legal right given or promised, 105.
origin of the doctrine, 40-43.
in debt, 41.
in covenant, 41-42.
in assumpsit, 42-43.
sufficiency of, 7, 104, 109, 119, 140.
good, 106, 108.
reason for, 105.
quid pro quo, 41-42, 106.
in unilateral agreements, 107-116, 113, 119.
in bilateral agreements, 116-120.
instances of, 104, 108.
detriment to promisee, 107, 111, 113, 114-115.
mutual promises, 116-120.
promise of detriment, 116-120.
in accessory contracts, 177.
adequacy of, 104-106, 108.

[References are to pages.]

for assignment, 98.
relinquishment of personal rights, 108, 115.
performance of legal obligation, 104, 107-108, 110-112.
part payment of debt, 108, 110.
accords and satisfactions, 104, 119.
compromises, 104, 108, 114-115.
forbearance to sue, 104, 108, 114-115.
compositions with creditors, 104.
subscription papers, 104, 107, 109.
marriage, 108, 138.
past, 104, 107-109.
moral obligation, 104, 108, 112.
in deeds, 108.
in commercial paper, 108.
relation of offer and acceptance to, 107, 157-158.
relation to discharge, 211.
illegal, 114, 120.
unforeseen difficulties as, 110-111.
failure of and discharge, 113.
return of, 67, 72, 75, 79, 86, 90.
distinguished from illegality, 107.

CONSTRUCTION OF CONTRACTS—
general rules, 181-185.
primary rule—intention, 181.
whole of contract given effect, 181-182.
clerical errors, 181.
grammar, 181.
plain literal signification, 182.
meaning of words, 182.
surrounding circumstances, 183.
custom and usage, 182.
documents part of the same transaction, 183-184.
ambiguous language, 184-185.
general and particular words, 181.
construction by the parties, 183.
upholding the transaction, 184.
punctuation, 181.
written and printed words and figures, 182-183.
favorable, 184.
penalties and liquidated damages, 184-185.

CONTRACT—
definition of, 5.
ancient essentials of, 41-43.
modern essentials of, 6, 43, 147.
lack of general principles at common law, 40.

[References are to pages.]

agreement broader than, 6.
subject-matter of, 2.
made by agent, 93-95.
common law encourages, 28, 122.
formal, 143-164.
of record, 38-39.
executed, 2, 168.
executory, 3, 168.
express, 166-167.
inferred, 166-167.
unilateral, 5, 45, 102-120, 166-167.
bilateral, 5, 45, 107-120, 166-167.
written, 167.
oral, 168.
modified, 15.
substantially performed, 15-16, 190-202.
lapsed, 16-17.
lack of authority to make, 18-19.
effect of valid express on quasi, 28-29.
uberrimae fidei, 65.
valid, 6, 83, 89, 172.
voidable, 6-7, 67, 72, 75, 78, 83, 89, 172, 199.
unenforcible, 18-22, 148, 172, 195, 199.
priority of, 144.
for work, labor and materials, 159-160.
classification of, 165-177.
freedom of, 202-203, 206.
discharge of, 200-226.
breach of, 186-193, 196-198, 214-221.
determining validity of, 185.
evidence of, 178-180.
performance of, 207-211.
rescission of, 193-195, 211.
voidable contract and void and unenforcible agreements, 172.
construction of, 181-185.
entire and divisible, 121-122, 168-172, 190-193.
essence of, 187, 191, 196.
operation of, 92-103, 165-197, 200-207.
unconditional, 168.
conditional, 168.
joint, 100-103, 167.
joint and several, 100-103, 167.
several, 100-103, 167.
partnership, 176-177.
assignment of, 95-100.
modern theory of, 42-43.

[References are to pages.]

consensual, 143.
specialty, 144, 167.

CONTRACTUAL OBLIGATION—
nature of, 3, 6.
different meanings of, 5-7.
essentials of, 5-7, 40, 43, 44, 59, 81, 104-105, 121, 143.
parties must intend to create, 58.
cannot be imposed on third party, 92.

CONTRIBUTION—
a quasi contractual obligation, 36-37.

CONVEYANCE—
definition of, 173-174.
subject-matter of, 173-174.
construction of, 184.
required to be under seal, 144-146.
required to be in writing; 145, 155-158.
required to be delivered, 146-147.

CONVICTS—
contractual capacity of, 92.

CORPORATIONS—
contractual capacity of, 82.

COURT—
functions of, 33, 178-179.

COVENANT—
in unilateral and bilateral agreements, 169-171.
action of, 41-42, 146.
to stand seized, 145.
breach of, 190.
running with the land, 97.

CRIMES—
subject-matter of, 172.
agreements to commit, 123-124.
compounding, 133.

CRIMINAL PROSECUTION—
threats of, 73.

CUSTOM AND USAGE, 180, 182.

D.

DAMAGES—
theory of, 197.

[References are to pages.]

uominal, 196.
direct, 196-198.
consequential, 196-198.
liquidated, 184-185, 194.
for breach of contract, 196-198.
for failure to perform quasi contract, 198-199.
measure of, 27, 196-199.
relation to specific performance, 196.

DEATH—
assignment by, 96-97.
discharge by, 206.
effect on joint and several obligations, 101-103.
terminates offer, 50.
terminates agency, 93.

DEBT—
definition of, 41.
action of, 38, 41.

DECEIT—
ground for recovery in quasi contract, 12-13.

DEED-POLL—
definition of, 145.

DEEDS—
requisites of, 144-147.
acceptance of, 146-147.
consideration in, 144.
conditions in, 169.
agent's authority to make, 156-158.

DELIVERY OF DEEDS—
necessity of, 146-147.
in escrow, 146.

DEMAND AND NOTICE—
waiver of, 108, 112.

DEPENDENCY—
implied, 169-171, 215-220.
a question of intention, 169-170.
a question of relative time of performance, 170.
general, 170, 219-221.
mutual, 170, 190, 216-220.

DETRIMENT—
as consideration, 42, 107-108, 113, 114.

[References are to pages.]

DISAFFIRMANCE—
by infants, 85-86, 88.
by insane persons, 90.
for misrepresentation and fraud, 67, 72.
for undue influence, 78-79.
for duress, 75.

DISCHARGE IN BANKRUPTCY—
waiver of, 108, 112, 163.

DISCHARGE OF ANTECEDENT RIGHTS OF CONTRACTS—
by another contract, 211.
by happening of conditions, 201-207.
by substitution, 211-212.
by modification, 211-212.
by voluntary act, 213.
by gift to the promisor, 211.
by rescission, 211.
by novation, 211-213.
by breach going to essence, 215.
by cancellation and surrender, 213-214.
by repudiation of performance, 214-221.
by prevention of performance, 214-221.
by failure of performance, 214-221.
by alteration or loss of written instrument, 214.
by merger, 211-212.
by performance, 207-211.
by death, 206.
by impossibility, 206.
by destruction of subject-matter, 204-207.
by tender, 209.
of joint contracts, 101-103.

DISCHARGE OF REMEDIAL RIGHTS OF CONTRACTS—
by act of the parties, 221-225.
by operation of law, 225-226.
by release, 221.
by accord and satisfaction, 222-224.
by arbitration and award, 224-225.
by judgment, 225.
by discharge in bankruptcy, 225.
by statute of limitations, 226.
by change in law, 226.

DOCUMENT—
proof of, 179.
evidence that it is not a contract, 179-180.
discharge of, 211, 213-214.

[References are to pages.]

DRUNKARDS—
contractual capacity of, 90.
contracts of, 89-90.

DURESS—
distinguished from undue influence, 60.
distinguished from unlawfulness, 133, 135-136.
ground for recovery in quasi contract, 14-15.
of imprisonment, 72-73.
per minas, 73-74.
of goods, 74-75.
in execution, 75,
in inducement, 75.
effect of, 75-76.

E.

EARNEST AND PART PAYMENT—
as used in statute of frauds, 161.

ELECTION OF REMEDIES, 29-31.

EMPLOYMENT CONTRACT—
subject-matter of, 176-177.

EQUITY AND GOOD CONSCIENCE, 9-22.

ESCROW, 146.

ESSENCE OF THE CONTRACT—
breach going to the, 187, 191, 196, 215, 218.

ESTOPPEL—
application of in quasi contracts, 29-30.
application of in agreement, 54.

EVIDENCE—
oral, 179-180.
seal as, 107, 145-146.
that document is not a contract, 179-180.
as to terms of contract, 180.
rules of, 178-180.
relation of statute of frauds to, 148.

EX AEQUO ET BONO, 9.

EXECUTED CONTRACTS—
definition of, 168.
create rights in rem, 2.

[References are to pages.]

EXECUTORS AND ADMINISTRATORS—
contracts of within statute of frauds, 149-150.

EXECUTORY CONTRACTS—
definition of, 168.
create rights in personam, 3.
unconditional, 168.
upon condition, 168.

EXPRESS CONTRACTS—
definition of, 166.

F.

FAILURE OF CONSIDERATION—
discharge by, 205-207.

FAMILY RELATION—
fiduciary, 76-77.
liability of members in quasi contract, 31.

FIDUCIARIES—
who are, 65, 76-77.
duty of disclosure by, 65-67, 76-77.

FIGURES—
controlled by words, 182.

FIXTURES—
under statute of frauds, 156.

FORBEARANCE TO SUE—
as consideration, 104, 108, 114-115.

FORMAL CONTRACTS—
definition of, 144.
enumeration of, 143-164.
specialties, 143-147.
commercial paper, 147.
writing required by statute of frauds, 147-164.
discharge of, 213-214.

FORMLESS CONTRACTS, 164.

FRAUD—
definition of, 68.
distinguished from mistake, 60.
ground for recovery in quasi contract, 12.

[References are to pages.]

representation, 69.
falsity, 70.
material fact, 70.
knowledge of falsity, 70-71.
intent to deceive, 71.
material inducement, 71-72.
injury, 72.
on creditors, 124-125.
in execution of written contracts, 61, 194-195.
constructive, 68-69.
at law and in equity, 68-69.
effect of, 72.

FRAUDS, STATUTE OF. (See statute of frauds.)

G.

GENERAL AVERAGE—
quasi contractual obligation of, 36-37.

GIFT—
inter vivos and causa mortis, 214.
on condition, 113.
not legally obligatory, 105, 114.
in form of lottery, 130.

GOOD WILL OF BUSINESS, 141.

GUARANTIES—
subject-matter of, 177.
dependency of, 168-171.
under statute of frauds, 150-152.

H.

HISTORY OF ACTIONS, 41-43.

I.

ILLEGAL AGREEMENTS—
prohibited by law, 123-131.
contrary to the policy of the law, 131-142.
to commit crime, 123-124.
to commit tort, 124-126.
practicing without license, 126-127.
made on Sunday, 127-128.
wagers, 128-130.
lotteries, 130-131.

[References are to pages.]

usury, 131.
dealings with alien enemies, 131.
traffic in public offices, 132-133.
interfering with public justice, 133-136.
immoral, 136-138.
relieving from liability for negligence, 138.
creating monopoly, 139.
restraint of trade, 139-141.
injuring public health, 142.

ILLEGALITY—
general rules as to, 121-123.
partial, 121-122.
distinguished from consideration, 107.
as affecting recovery in quasi contract, 23-25.

ILLITERACY—
as affecting contractual capacity, 89.

IMBECILE—
definition of, 88-89.
contractual capacity of, 89.

IMMORAL AGREEMENTS—
unlawfulness of, 136-138.

IMPOSSIBILITY—
inherent, 110-111.
legal, 171.
of performance, 206-207.
discharge by, 206.

IMPRISONMENT—
duress of, 72-73.
threats of, 73-74.

INCAPACITY OF PARTY—
as affecting power to contract, 82-91.
ground for recovery in quasi contract, 19.

INDEBITATUS ASSUMPSIT, 13.

INDEMNITY—
for illegal acts, 136.
under the statute of frauds, 151.
when document is lost, 214.

INDENTURE—
definition of, 145.

[References are to pages.]

INFANCY—
waiver of defense of, 108, 163.
ground for rescission, 83-84, 195.
personal privilege to plead, 88.

INFANTS—
definition of, 83.
contractual capacity of, 83-84.
time of attaining majority, 83.
contracts of, 83-84.
disaffirmance of voidable contracts by, 86-87.
requisites of rescission by, 86.
effect of disaffirmance and ratification by, 88.
liability on quasi contract, 31-32.

INFERRED CONTRACTS—
definition of, 166.

INJUNCTION—
remedy of, 195-196.

INJURY—
meaning of, 72.

IN LIMINE, 215.

INNOCENT THIRD PARTIES—
protected against suits in quasi contracts, 26-27.
rights against persons non compos mentis, 90.
rights against drunkards, 90.
rights on agreements affected with mistake, 63.
rights on contracts procured by misrepresentation, 67.
rights on contracts procured by fraud, 72.
rights on contracts procured by duress, 75-76.
rights on contracts procured by undue influence, 78-79.
rights against infants, 88.

IN PARI DELICTO, 23-25, 129.

INSANE PERSONS—
liability for necessaries, 31-32.
contractual capacity of, 89.
contracts of, 89-91.

INSANITY—
definition of, 88-89.
termination of offer by, 50.
termination of agency by, 93.

[References are to pages.]

IN SPECIE, 86.

IN STATU QUO, 72, 75, 90.

INSURANCE CONTRACT—
definition of, 175.
subject-matter of, 175.
requirement of writing for, 163.
duty of disclosure in making, 65, 68.
conditions in, 169.

INTENTION—
meaning of "common," 51.
in agreement, 43, 57-58.
not necessary for quasi contract, 4.
innocently illegal, 23-24, 122-123.
of one party illegal, 122-123, 129-130.
failure to express, 60.
as an element of fraud, 71.
primary rule of construction, 181-185.
definite, 57-58.
to create legal relations, 58.
unreal, 59-60.

INTEREST—
contracts that must be in writing, 164.

INTERPRETATION OF CONTRACTS, 178-185.

IPSO FACTO, 168, 201.

J.

JEST—
promises made in, 58.

JOINT CONTRACTS—
definition of, 167.
presumption of, 100-101.
survivorship in, 101-102.
release in, 101-102.
suits on, 101.

JOINT AND SEVERAL CONTRACTS—
definition of, 167.
survivorship in, 103.
presumption, 100.
discharge of, 103.
suits on, 103.

[References are to pages.]

JUDGMENTS—
as quasi contracts, 38-39, 144.
discharge of remedy by, 225.
finality of, 29-30.

JURISDICTION—
agreements ousting, 133, 136.

JURY—
functions of, 33, 178-179.

K.

KNOWLEDGE—
of offer essential, 46.
of acceptance not essential, 55.
of revocation of offer essential, 48-49.
equivalent to notice, 49.
as an element of fraud, 70-71.
of insanity, 89.
duty to disclose facts within, 64-67.
of unlawful intent of other party, 129-130.

L.

LACK OF AUTHORITY—
ground for recovery in quasi contract, 18-19.

LAND—
agreements within statute of frauds, 155-157.

LAW—
substantive, 2.
adjective, 2.
questions of, 33, 178-179.
representations of, 69.

LEASE—
subject-matter of, 174.
under statute of frauds, 153, 155.

LEGAL RIGHTS—
definition of, 1.
antecedent, 1, 193, 201.
remedial, 1, 5, 193.
in rem, 2, 171, 176.
in personam, 3, 172-177, 187.
public, 2-3.
private, 2-3.

[References are to pages.]

as consideration, 104-120.
subject-matter of contracts, 2, 172-177.
breach of, 186-187.
discharge of, 200-226.

LEX FORI, 148, 185.

LEX LOCI CONTRACTUS, 185.

LEX LOCI SOLUTIONIS, 185.

LEX SITUS, 185.

LIABILITY—
cannot be assigned, 95-96, 98.

LIMITATIONS, STATUTE OF. (See statute of limitations.)

LIQUIDATED DAMAGES, 184-185, 194, 197.

LOCUS POENITENTIAE, 47-48.

LOTTERIES—
definition of, 130.
illegality of, 130-131.

LUNATICS—
definition of, 89.
contractual capacity of, 89.
contracts of, 89-90.

M.

MAINTENANCE—
meaning of, 133.
unlawfulness of, 133-135.

MALUM IN SE, 23-24.

MALUM PROHIBITUM, 23-24.

MARRIAGE—
definition of, 176.
subject-matter of, 176.
agreements interfering with, 137-138.
agreements affecting freedom of, 137-138.
as consideration, 108, 138.
assignment by, 96-97.
of infants, 83.
of persons non compos mentis, 89.
contracts within statute of frauds, 152.

[References are to pages.]

MARRIED WOMEN—
contractual capacity of, 91.

MEMORANDUM—
under statute of frauds, 147-164.

MENTAL INCAPACITY—
element in establishing undue influence, 76.
effect on contract of, 83, 89.

MERGER—
of joint contracts, 101-103.
discharge by, 212.

MISREPRESENTATION—
ground for recovery in quasi contract, 13.
ground for rescission, 65-67.
innocent distinguished from fraudulent, 64-65, 68-69.
of opinion, 69.
of law, 69.
of intention, 69.
must induce making of contract, 64.
effect of, 64, 67.

MISTAKE—
ground for recovery in quasi contract, 20-21.
distinguished from fraud, 60.
vitiating agreement, 60.
as to nature of transaction, 61.
as to terms of offer, 60.
as to identity of thing, 62.
as to existence of thing, 61, 204.
as to identity of promisee, 62.
condition in offer, 204.
coupled with fraud, 63.
effect of, 60,63.
ground for reformation, 60, 194-195.

MONOPOLIES—
agreements creating, 139.

MORAL OBLIGATION—
as consideration, 104.

MORTGAGE—
subject-matter of, 177.

[References are to pages.]

N.

NECESSARIES (FOR PERSONS OF INCAPACITY)—
definition of, 32-33.
functions of court and jury concerning, 33.
liability for, 31-32.

NECESSITY—
works of, 127-128.

NEGLIGENCE—
agreements relieving from, 138.

NEGOTIABLE INSTRUMENTS—
assignment of, 96.
payment by, 209.

NON COMPOS MENTIS—
definition of, 88.
total derangement, 88.
temporary derangement, 88.
partial derangement, 88.
contracts of, 89-90.
disaffirmance and ratification by, 90.
requisites of disaffirmance by, 90.
effect of disaffirmance by, 91.
disaffirmance personal privilege of, 91.

NONDISCLOSURE—
effect of, 68-69.

NOTICE—
of election between alternative promises, 209-210.
necessary when thing promised within peculiar knowledge of other party, 220-221.
of assignment, 98-99.
of withdrawal of offer, 48-49.

NOVATION—
distinguished from right of stranger to enforce contract, 35.
discharge by, 211-213.
by change of parties, 93, 211-213.
relation to statute of frauds, 150-151, 211.

NUDUM PACTUM, 111.

O.

OBJECT OF AGREEMENT—
must be legal, 7.
illegality of, 121-142.

[References are to pages.]

OBLIGATIONS—
definition of, 3, 6.
of contract, 5-7, 81, 92, 97.
of quasi contract, 4, 8-38.
agreement must contemplate, 58.
legal, 3-7, 97.
imperfect, 172.
classification of quasi contractual, 8-9.
of record, 38-39, 144.
equitable, 9-33.
statutory, 34.
customary, 34-38.
relation of conditions to, 168-172.
law impairing, 226.

OFFER—
definition of, 44-45.
distinguished from solicitation of order, 44-45.
distinguished from option, 47, 144.
inferred distinguished from implied, 45.
by words, 45.
by conduct, 45.
communication of, 46.
continuation of, 46-47.
of promise, 45.
of act, 45.
under seal, 144.
acceptance of, 51-57.
ignorance of, 53.
two, 44.
counter-offer, 50-51.
lapse of, 49-51.
by post, 46-47.
by publication, 48.
revocation of, 47-49.

OFFER AND ACCEPTANCE—
two offers not, 44.
absolute identity essential, 51.
agreement created by, 43.

OPERATION OF CONTRACTS—
as to subject-matter, 168, 200-207.
as to parties thereto, 100-103.
as to third parties, 92-93, 109.
as to assignees, 96-98.

[References are to pages.]

OPINION—
representations of, 69.

OPTION—
distinguished from offer, 47.

ORAL CONTRACTS—
definition of, 168.
reformation of written to conform to, 194.

ORAL EVIDENCE, 179-180

P.

PAROL EVIDENCE—
inadmissibility of, 179-180.

PARTIES—
certainty of, 81-82.
competency of, 81-92.
privity of, 81, 92-100, 146.
number of, 81, 100-103.

PARTNERSHIP CONTRACTS—
subject-matter of, 176-177.
under statute of frauds, 155-156.

PART PAYMENT—
as consideration, 108, 110.
as used in statute of frauds, 161.

PART PERFORMANCE—
breach after, 187, 191.
under statute of frauds, 149, 155.

PAST CONSIDERATION, 104, 107-109.

PAYMENT—
concurrent condition with delivery, 215-216.
of part of debt as consideration, 108, 110.
part, under statute of frauds, 161.
discharge by, 209.

PENALTIES AND LIQUIDATED DAMAGES, 184-185, 197.

PERFORMANCE—
relation to implied conditions, 169-170.
of conditions, 16-17, 168-172.
in ignorance of offer, 53.
substantial, 15-16, 190, 202.

[References are to pages.]

discharge of contracts by, 207-211.
specific, 65, 87, 187, 196.
part, under statute of frauds, 149-155.
time of, 187.
of award, 224-225.
repudiation of, 17, 187-189, 197, 214-221.
prevention of, 189, 197, 214-221.
failure of, 17, 190-193, 199, 214-221.

PERSONAL CONTRACTS—
assignability of, 96, 98.

PERSONALTY—
infants' contracts relating to, 85.

PHYSICAL RESTRAINT—
in duress, 72.

PLEDGE—
subject-matter of, 177.

POWER OF ATTORNEY—
of infants, 83-84.
of persons non compos mentis, 89.

PRINCIPAL—
disclosed, 93-95.
undisclosed, 93-95.

PRINCIPAL CONTRACT—
definition of, 173.
subject-matter of, 173.

PRINTED CONTRACTS—
construction of, 182-183.

PRIORITY—
of contracts, 144.
legislature cannot change, 226.

PRIVITY OF PARTIES, 92-100.

PROMISE—
a proposal accepted, 44.
nature of, 187.
offer, 45.
acceptance, 52.
silence as, 54.
dependent, 168-172, 190-193, 207-208, 214-221.
independent, 168, 190-193, 207-208, 214-215.

[References are to pages.]

absolute, 168, 190, 214-215.
divisible, 168, 190, 214-215.
subsidiary, 168, 190, 214-215.

PROMISEE'S CONDUCT—
refusal to accept repudiation, 188.
breach of contract by, 187-189.

PROMISSORY CONDITIONS—
definition of, 168-169, 201.
classified, 168-172.
precedent, 168, 208, 214-215, 220-221.
concurrent, 169, 209-210, 214-220.
subsequent, 169, 205, 214, 218-220.
express, 168-172.
implied, 168-172.
dependency in, 170, 215-221.
breach of, 190-193.
discharge by perfermance of, 208-211.
discharge by breach of, 214-221.

PROMISSORY NOTES—
must be in writing, 147.

PROPERTY—
right of, 2.
threats to destroy, 74.
of married woman, 91.

PROSECUTION—
agreements stifling, 133, 135-136.
threats of, 73-74.

PRO TANTO, 148.

PUBLIC HEALTH AND SAFETY—
agreements injuring, 142.

PUBLIC OFFICES AND OFFICERS—
agreements to interfere with, 132-133.

PUBLIC POLICY—
agreements against, 131-142.

PUBLIC SERVICE COMPANIES—
implied obligation of, 37.
agreements concerning liability, 138.

PUNCTUATION—
in construction of contracts, 181.

[References are to pages.]

Q.

QUANTUM MERUIT, 12, 15, 17-21.

QUANTUM VALEBAT, 13, 15-21.

QUASI CONTRACTS—
definition of, 4, 166.
distinguished, 4.
obligations equitable, 9-33, 109, 111.
obligations statutory, 34.
obligations customary, 34-38.
obligations of record, 38-39, 144.
as affected by illegality, 23-25, 122, 129.
damages in, 198-199.
discharge of, 194, 221-226.

QUID PRO QUO, 41-42, 105-106.

R.

RATIFICATION—
relation to consideration, 108, 112.
by infants, 86-87.
by insane persons, 90-91.
by principal, 95.
of contracts procured by misrepresentation, 67.
of contracts procured by fraud, 72.
of contracts procured by duress, 75.
of contracts procured by undue influence, 78-79.
what amounts to, 67, 86, 90.
personal privilege, 88, 91.

READINESS AND WILLINGNESS, 190, 204, 209-211, 215.

REALTY—
infants' contracts relating to, 85.
insane persons' contracts relating to, 90.

REFORMATION—
of contracts, 194-195.
for mistake of both parties, 194-195.
for mistake of one party and fraud of other, 194-195.

RELEASE—
discharge of remedial right by, 194-221.
under seal, 145.
by joint and joint and several parties, 101-103.

[References are to pages.]

REMEDIES—
judicial, 193-199.
extra judicial, 193-194.
retaliation, 193.
reformation, 194-195.
rescission, 195.
injunction, 195-196.
specific performance, 65, 87, 196.
damages, 196-198.
discharge of, 221-226.
may be changed by legislature, 226.

REPRESENTATIONS—
what constitute, 69.
distinguished from conditions, 64.
false, 70.
material, 70.
falsity known, 70-71.
made to be acted on, 71.
reasonably relied and acted on, 71.

REPUDIATION—
breach by, 186-189.
discharge by, 214-220.
must be accepted by promisee, 186-189.

RES ADJUDICATA, 29-30, 225.

RESCISSION—
discharge by, 211.
modes of, 193-195.
in pais, 193-194.
by plea, 195.
judicial, 195.
of infants' contracts, 85-86, 88, 193, 195.
of insane persons' contracts, 90, 193.
of contracts voidable for duress, undue influence and fraud, 65, 72, 75, 78-79, 195.
restitution necessary to, 86, 90, 195.
barred by ratification, 195.
effect of, 195.

RESTITUTION—
when necessary for rescission, 86-90, 195.

RESTRAINT OF TRADE—
agreements in, 139-141.

[References are to pages.]

partial, 140-141.
monopolies, 139.

RETALIATION, 193.

REVOCATION OF OFFER—
time of, 47-48, 50.
notice of, 48-49.
by expiration, 49.
by operation of law, 49-50.

REWARDS FOR INFORMATION, 52-54.

S.

SALES—
definition of, 174-175.
subject-matter of, 174-175.
of property for illegal use, 123-124.
dependency in, 168-172.
within statute of frauds, 158-164.

SATISFACTION—
of accord, 222-224.
as consideration, 104.
discharge by, 194, 222-224.

SCIENTER, 70-71.

SEAL—
definition of, 145.
nature of, 41-42.
agreements requiring, 143-146.
contracts under, how proved, 179.
implies consideration, 106.
abolished, 144.
offer under, 47.

SEPARATION—
agreements for, 137.

SEVERAL CONTRACTS—
definition of, 167.
presumption, 100-101.
survivorship in, 102.
suits on, 102.

SIGNING OF DEEDS, 145.

[References are to pages.]

SILENCE—
as a promise, 54.
as a misrepresentation, 65-67.

SOVERIGN STATES—
competency of, to contract, 82.

SPECIALTIES—
definition of, 144, 167.
discussion of, 143-147.
discharge of, 213-214.

SPECIFIC PERFORMANCE—
remedy of, 196.
grounds of equitable jurisdiction, 196.
damages must be inadequate remedy, 196.
will not lie in case of misrepresentation, 65.
will not lie for infant, 87.

STATUTE OF FRAUDS—
fourth section of, 149.
seventeenth section of, 149.
agreements within, 147-164.
contracts of executors and administrators, 149-150.
guaranties, 150-151.
contracts of indemnity, 150-151.
contracts of novation, 150-151, 211.
promises to debtor, 151-152.
new consideration rule, 150.
promises to pay one's own debt, 150.
marriage contracts, 152.
contracts concerning land, 155-158.
agreements not to be performed within year, 153-155.
goods, wares and merchandise, 158.
provision as to price, 158-159.
requirements of, 148-164.
memorandum for, 147-149, 158, 161-163.
connected documents and oral evidence, 148, 157-158, 162-163.
description of parties in memorandum, 148.
terms of contract stated in memorandum, 148.
consideration stated in memorandum, 157-158.
signature to memorandum, 148.
when memorandum must be given, 162-163.
acceptance and receipt, 158, 160-161.
earnest and part payment, 158, 161.
effect of, 148.
ground for recovery in quasi contract, 19-20, 28, 149, 153.

[References are to pages.]

conveyances distinguished from sales, 155-156.
work, labor and materials, 159-160.
does not apply to rescission, 211.
part performance, effect of, 149, 155.

STATUTE OF LIMITATIONS—
waiver of, 108, 112-113, 163.
discharge of remedy by, 144, 146, 226.
legislative change of, 226.

STATUTES—
directory, 126-127.
mandatory, 126-127.

STIFLING PROSECUTION, 133, 135-136.

STRANGER—
contracts enforced by, 92, 93, 109.

SUBJECT-MATTER—
definition of, 172.
of contracts, 2, 172-177.
of principal contract, 173.
of accessory contract, 177.
of conveyance, 173-174.
of lease, 174.
of sale, 174-175.
of bailment contract, 175.
of insurance contract, 175-176.
of marriage contract, 176.
of employment contract, 176-177.
existence of, 61, 204.
evidence of, 179-180.
construction of, 183-184.

SUBSTANTIAL PERFORMANCE—
ground for recovery in quasi contract, 15-16, 190, 202.

SUBSTANTIVE LAW, 2.

SUNDAY—
work and labor on, 127-128.

SURVIVORSHIP—
of joint, joint and several, and several contracts, 101-103.

[References are to pages.]

T.

TECHNICAL WORDS—
construction of, 182.
evidence of, 180.

TENDER—
readiness and willingness, 204, 209, 215.
discharge by, 209, 216, 218.

TESTS OF SALE, 159-160.

THIRD PARTIES (See innocent third parties.)—
right to sue on contract, 34-35, 92-93, 109-146.

TIME—
of acceptance, 54-55.
prescribed, 47, 49-50, 54-55.
reasonable, 49.
essence of the contract, 184.

TORT—
subject-matter of, 172.
agreements to commit, 124.
as affecting recovery in quasi contract, 12-13, 29-31.

TRESPASS ON THE CASE—
relation of assumpsit to, 42.

U.

UBERRIMAE FIDEI, 65, 68.

ULTRA VIRES, 82.

UNCONDITIONAL CONTRACTS—
definition of, 168.

UNDUE INFLUENCE—
what constitutes, 76.
distinguished from duress, 60.
in confidential relationships, 76-77.
no confidential relationship, 77-78.
ground for recovery in quasi contract, 13-14.
presumptions, 76-78.
effect, 78-79.

UNILATERAL CONTRACTS—
definition of, 166.
distinguished from bilateral, 5, 45, 166-167, 171.

[References are to pages.]

acceptance in, 52.
consideration in, 42, 107-120.
dependency in, 168-172.
breach of, 186-187.
discharge of, 207, 211.

USAGES—
oral evidence of, 180.
meaning of words according to, 182.

USURY—
definition of, 131.
illegality of, 131.

V.

VALID CONTRACT—
definition of, 6, 172.
elements of, 6.

VOIDABLE CONTRACT—
definition of, 6, 172.
distinguished from void agreement, 6-7, 124.
rescission of, 193-194.
result of incapacity and lack of freedom of action, 64-79, 83-91.
recovery in quasi contract, 198-199.
breach of, 186-187.

VOID AGREEMENT—
definition of, 6, 172.
distinguished from voidable contract, 6-7, 124.
recovery in quasi contract on, 20.

VOLUNTARY ACT—
not obligatory, 105.
not ground for recovery in quasi contract, 22-23.

W.

WAGER OF LAW—
trial by, 41.

WAGERS—
definition of, 128.
illegality of, 128-130.

WAIVER—
of conditions, 193-194, 202.
of defenses, 108, 112, 149.

[References are to pages.]

WARRANTIES—
representations, 64.
distinguished from conditions, 64, 168.
implied, 38, 95.
subject-matter of, 177.
gratuitous, 108-109.

WORK, LABOR AND MATERIALS—
contracts for, 159-160.

WRITING—
requirement of, 147-164

WRITS—
of chancery, origin of assumpsit, 42.

WRITTEN CONTRACTS—
definition of, 167.
fraud in execution of, 61.
reformation of, 194-195.
evidence of, 179-180.
discharge by alteration of, 214.
cancellation and surrender of, 213-214.

Y.

YEAR—
under statute of frauds, 153-155.